(22,720)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 313.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

BOISE CITY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1912.

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a United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation) (Defendant), Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Printed Transcript of Record.

Filed Aug. 3, 1910. F. D. Monckton, Clerk.

1 (*Names and Addresses of Attorneys.*)

Frank B. Kinyon, Esq., Messrs. Cavanah & Blake, Boise, Idaho, Attorneys for Appellant.
Messrs. Johnson & Johnson, Boise, Idaho, Attorneys for Appellee.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY (a Corporation), Defendant.

Amended Complaint.

Comes now the above-named plaintiff, Boise City, a municipal corporation of the State of Idaho, and for cause of action against the defendant herein, complains and alleges:

I.

That the plaintiff, Boise City, is now and at all times hereinafter mentioned, has been a municipal corporation within the county of Ada, State of Idaho, created by and existing under the laws of the State of Idaho.

2 II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry

on and conduct a waterworks system and to sell and rent water to the inhabitants of said Boise City.

III.

That on the third day of October, 1889, said Boise City, by its Mayor and Common Council, passed and adopted *on* ordinance granting to one H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks, a license for an indefinite period to lay, construct and repair waterpipes in the streets and alleys of said Boise City, through which water is now and at all times herein mentioned has been furnished by said defendant and its predecessors in interest in and to said waterworks system to the plaintiff, and the residents and inhabitants of said Boise City for profit, which said ordinance was accepted by the said predecessors in interest of said defendant in and to said waterworks system, a copy of said ordinance approved October 3d, 1889, is as follows, to wit:

Ordinance No. 94.

An Ordinance Granting to Eastman Brothers the Right to Lay Water Pipes in Boise City.

The Mayor and Common Council of Boise City, I. T., ordain:

3 SECTION 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

SECTION 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3d day of October, 1889.

Approved:

JAMES A. PINNEY, *Mayor.*

Attest:

[SEAL.] C. S. McCONNEL,
City Clerk.

IV.

That the said defendant, The Boise Artesian Hot and Cold Water Company, now is and has been for a period of more than two years last past, the successor in interest of the said H. B. Eastman and B. M. Eastman, in and to the waterworks system herein referred to, and *are* now and for a period of more than two years last past, has been engaged in the sale and rental of water for profit from its said

waterworks system to the plaintiff and the residents and inhabitants of said Boise City under the provisions of the aforesaid ordinance and license.

4

V.

That the said defendant, the Boise Artesian Hot and Cold Water Company, and its predecessors in interest in and to its said waterworks system, *are* now, and ever since the 3d day of October, 1889, *have* been uisng the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City through the water-pipes of said waterworks system, and in the laying and repairing of said water-pipes connected with its said waterworks system.

VI.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an Ordinance of said City No. 678, requiring the said defendant, the Boise Artesian Hot and Cold Water Company to pay to said Boise City on the first day of each and every month, a monthly license of three hundred ($300.00) Dollars for the use and occupancy of the streets and alleys of said Boise City by the said defendant in the sale and delivery of water to the plaintiff and the residents and inhabitants of said Boise City, through the said water-pipes of said defendant laid and maintained by said defendant in the streets and alleys of said Boise City, and for the privilege granted by the aforesaid Ordinance No. 94, approved October 3, 1889; that in said Ordinance No. 678, demand was thereby made by said Boise City of and from the said defendant to thereafter pay to said Boise City on the first day of each and every

5 month, said monthly license of $300.00, and the City Clerk of said Boise City was required by the provisions of said Ordinance No. 678 to notify said defendant of the requirements of said Ordinance No. 678.

VII.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve (12) members, and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the common council of said Boise City over the veto of said Mayor by a two-third vote cast by the members of the Common Council of said Boise City.

VIII.

That the City Clerk of said Boise City duly notified the said Boise Artesian Hot and Cold Water Company of the requirements of said Ordinance No. 678, and from and after the enactment of said Ordinance No. 678, and until this action was begun did on the first day of each and every month demand of said defendant the payment of said monthly license of $300.00 required by said ordinance, but

the said defendant refused on the first day of each and every month after the enactment and approval of said ordinance No. 678 until the beginning of this suit, and still refuses and neglects to pay said monthly license or any part thereof to said Boise City.

IX.

That on the 6th day of December, 1906, the plaintiff by its
6 Mayor and Common Council, passed and approved an Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any Court of competent jurisdiction against the said defendant for the enforcement of the provisions of said Ordinance No. 678, and the collection from said defendant of the sum of money due said Boise City from said defendants under the provisions of said Ordinance No. 678.

X.

That all of the aforesaid ordinances referred to herein are now and ever since their said passage and approval have been in force and have never been repealed.

XI.

That the said defendant and its predecessors in interest in and to said waterworks system have never at any time paid to said Boise City any compensation for the use and occupancy of said streets, and alleys of said Boise City by the said waterworks system of the defendant.

XII.

That by reason of the enactment and approval of the aforesaid ordinance and the use and occupancy of the said streets and alleys of said Boise City by the said defendant as aforesaid with its said waterworks system, the said defendant became and was on the first day of April, 1909, and now is indebted to Boise City in the sum of Ten Thousand One Hundred Thirty ($10,130.00) Dollars due as said license.

7 XIII.

That the said plaintiff did on the first day of each and every month from the said 7th day of June, 1906, to the first day of April, 1909, demand of the said defendant to pay the said amount due as said license, but the defendant refused and neglected to pay the same or any part thereof and that there is due and owing to the plaintiff on the first day of April, 1909, as such license the sum of Ten Thousand One Hundred Thirty ($10,130.00) Dollars.

Wherefore, the plaintiff prays judgment against the defendant herein for the sum of Ten Thousand One Hundred Thirty ($10,-130.00) Dollars, together with interest thereon at the rate provided

by law, from the date of filing this complaint until paid and for costs of suit.

F. B. KINYON,
Attorney for Plaintiff, Residence, Boise, Idaho.

STATE OF IDAHO,
County of Ada, ss:

Joseph T. Pence, being first duly sworn for and on behalf of Boise City, the above-named plaintiff, deposes and says: That he has read the foregoing amended complaint, knows the contents thereof and the facts therein stated are true of his own knowledge, except as to those matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true. That the above-named plaintiff, Boise City, situated in Ada County, Idaho, is a municipal corporation organized and
8 existing under and by virtue of the laws of the State of Idaho, and that affiant is the duly elected, qualified and acting Mayor of said plaintiff, and therefore he makes this affidavit as such Mayor for and on behalf of said plaintiff.

JOSEPH T. PENCE.

Subscribed and sworn to before me this 26 day of April, 1909.

[SEAL.] E. C. ROWELL,
Notary Public.

Service of a copy of the foregoing Amended Complaint is hereby acknowledged this 12th day of May, 1909.

JOHNSON & JOHNSON AND
EDGAR WILSON,
Attorneys for Defendant.

[Endorsed:] Filed April 26, 1909. W. L. Cuddy, Clerk. By W. D. McReynolds, Deputy Clerk.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), Defendant.

9 *Petition for Removal.*

To the Honorable District Court of the Third Judicial District of the State of Idaho in and for Ada County:

Your petitioner, the Boise Artesian Hot and Cold Water Company, Limited, the above-named defendant, appearing specially for the purpose of this petition only, respectfully shows to this Honor-

able Court, that this suit is of a civil nature, and that the matter and amount in dispute in said suit exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

That the controversy herein is and at the time of the commencement of this suit was between citizens of different States; and that your petitioner, the defendant in said suit, was, at the time of the commencement of the suit, and still is, a corporation organized and existing under the laws of the State of West Virginia, and a resident and citizen of said State and of no other State; and that the plaintiff, Boise City, is a municipal corporation organized and existing under the laws of the State of Idaho and a citizen of said state.

And your petitioner offers herewith a good and sufficient surety for its entering in the Circuit Court of the United States for the Central Division of the District of Idaho, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

10 And your petitioner therefore prays that the said surety and bond may be accepted; that this suit may be removed into the next Circuit Court of the United States to be held in the Central Division of the District of Idaho, pursuant to the Statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And your petitioner will ever pray.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
Petitioner,

By B. S. HOWE, *Secretary,*
EDGAR WILSON, AND
JOHNSON & JOHNSON,
Its Attorneys, Specially Appearing for the Purposes of This Petition Only.

STATE OF IDAHO,
County of Ada, ss:

B. S. Howe, being first duly sworn, deposes and says that he is the secretary of the Boise Artesian Hot and Cold Water Company, Limited, the above-named petitioner and makes this verification for and on behalf of said petitioner. That the foregoing petition is true to his own knowledge.

B. S. HOWE.

Subscribed and sworn to before me this 13th day of May, 1909.

[SEAL.] RICHARD H. JOHNSON,
Notary Public.

11 [Endorsed:] Filed May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), Defendant.

Bond on Removal.

Know All Men by These Presents: That the Boise Artesian Hot and Cold Water Company, Limited, as principal and Timothy Regan and James E. Clinton, Jr., of Boise City, Ada County, Idaho, as sureties, are holden and stand firmly bound unto Boise City, a municipal corporation of the State of Idaho, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto said Boise City, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents.

Upon condition nevertheless that, whereas, the said Boise Artesian Hot and Cold Water Company, Limited, has petitioned the District Court of the Third Judicial District of Idaho, held in and for Ada County, for the removal of a certain cause therein pending,
12 wherein the said Boise City is plaintiff and the said Boise Artesian Hot and Cold Water Company, Limited, is defendant to the Circuit Court of the United States for the Central Division of the District of Idaho.

Now, if the said Boise Artesian Hot and Cold Water Company, Limited, shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and virtue.

In Witness Whereof, the said Timothy Regan and James E. Clinton, Jr., have hereunto set their hands and seals this 13th day of May, 1909.

TIMOTHY REGAN. [SEAL.]
JAMES E. CLINTON, JR., [SEAL.]

STATE OF IDAHO,
County of Ada, ss:

Timothy Regan and James E. Clinton, Jr., being first duly sworn, each for himself and not one for the other, deposes and says, that he resides in Boise City, Ada County, Idaho, and is freeholder therein and is worth the sum of two thousand dollars over and above all property, exempt from execution.

TIMOTHY REGAN.
JAMES E. CLINTON, JR.

Subscribed and sworn to before me this 14th day of May, 1909.

[SEAL.] RICHARD H. JOHNSON,
Notary Public.

[Endorsed:] Filed May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), Defendant.

Order of Removal.

This cause coming on for hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the District of Idaho, Central Division, and it appearing that the defendant has filed its petition for such removal in due form of law, and that defendant has filed its bond duly conditioned, with good and sufficient sureties as provided by law, and it appearing to the Court that by the filing of plaintiff's amended complaint the amount prayed for in said complaint and in controversy in this action, exclusive of interest and costs, has been increased from seventeen hundred and fifty dollars, the amount prayed for in the original complaint, to ten thousand one hundred and thirty dollars, and that defendant has not pleaded to said amended complaint or demurred or answered thereto, and that the time has not elapsed wherein defendant is allowed under the practice and laws of the State of Idaho, and the rules of said court, to appear, plead, demur or answer said amended complaint, and it appearing that this is a proper cause for removal to said Circuit Court.

Now, therefore, it is hereby ordered and adjudged that this action be and it is hereby removed to the United States Circuit Court for the District of Idaho, Central Division, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 15 day of May, 1909.

FREMONT WOOD, *Judge.*

[Endorsed:] Filed May 15, 1909. W. L. Cuddy, Clerk. By Otto F. Peterson, Deputy.

15 [*Certificate to Record on Removal.*]

In the District Court of the Third Judicial District of the State of Idaho in and for the County of Ada.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Clerk's Certificate With Record.

STATE OF IDAHO,
County of Ada, ss:

I, W. L. Cuddy, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, hereby certify the above and foregoing to be a full, true and correct copy of the record, and whole thereof, in the above-entitled action, heretofore pending in said District court, being the action wherein Boise City, a Municipal Corporation is plaintiff and The Boise Artesian Hot and Cold Water Company, Limited, is defendant, said record consisting of the original complaint, filed on the 13th day of December, 1906, the summons and return thereon, filed on the 15th day of December, 1906, demurrer to original complaint filed on the 17th day of January, 1907, stipulation, filed on the 27th day of February, 1907, amended complaint, filed April 26th, 1909, order of the Court permitting plaintiff to file amended complaint,
16 petition for removal filed May 15th, 1909, bond on removal filed May 15th, 1909, and order of removal filed May 15th, 1909, all as appears on the files and of record in my office.

Given under my hand and the seal of said Court, at my office in Boise City, Idaho, this 17th day of May, 1909.

[SEAL.] W. L. CUDDY,
Clerk of District Court, Ada County, Idaho,
By OTTO F. PETERSON, *Deputy.*

I, Frank B. Kinyon, City Attorney of Boise City, and attorney for plaintiff herein, do hereby acknowledge the receipt of notice of the removal of said action to the Circuit Court of the United States for the District of Idaho, Central Division, and of the filing of the transcript of the record with the Clerk of said Circuit Court of the United States, this 17th day of May, 1909.

FRANK B. KINYON,
City Attorney and Attorney for Plaintiff.

[Endorsed:] Filed, May 17, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

17 *Stipulation* [*Filed January 6, 1909, of Facts*].

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the years 1908 and 1909; and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant-' mains as follows: On the corner of North 17th and Sherman Streets, North 19th and Sherman Streets, North 17th and Brumback Streets, North 21st and Ressigue Streets, and West State and 19th Streets.

That the plaintiff reserves its objections to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incompetent and not a defense to the action.

Dated January 6th, 1909.

F. B. KINYON AND
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON,
Attorneys for Defendant.

18 *Amounts Paid by City of Boise to the Boise Artesian Hot and Cold Water Company, from January, 1st, 1908, to December 1st, 1909.*

Date paid.		Domestic use.	Flushing sewers.	Street sprinkling.	Heating.
1908.					
January	4th.....	45.55	348.30	880.80	
February	8	30.40	177.55		
March	7	23.05	176.00		
April	6	24.55	176.40		
June	6	45.15	307.45		
August	10	50.24	94.60		
Sept.	10	29.66	47.30		
Oct.	6	30.03	47.30		
Nov.	7	31.16	47.30	3,300.00	
Dec.	5	26.00	47.30	.....	500.00

1909.						
January	6	.....	.....	.....	354.46	
March	8	.....	69.80	140.82		
May	10	.....	32.60	47.30		
June	9	.....	36.60	47.30		
July	6	.....	40.55	47.30		
August	18	.....	49.75	47.30		
Oct.	4	.....	67.50	94.60	2,000.00	
Nov.	7	.....	57.00	47.30	.....	337.00
Dec.	4	.....	38.25	47.30	1,763.84	
			$727.84	$1,989.12	$8,299.10	$837.50

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Summary.

Cold Water for Domestic Use	727.84
" " " Sewer Flushing	1,989.12
" " " Street Sprinkling	8,299.10
Hot Water for Heating City Hall	837.50
Total	$11,853.56

[Endorsed:] Filed Jan. 6, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Answer to Amended Complaint.

The above-named defendant answers plaintiff's amended complaint filed in the above-entitled action, as follows:

I.

This defendant admits the first and second allegations of said complaint and also avers that in addition to the power and authority mentioned in said second allegation, this defendant was expressly authorized and empowered by its charter or articles of incor-
20 poration, among other things, to take, purchase, acquire, hold, operate and maintain the rights and properties of water companies, associations or corporations, and to acquire, use, own, and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be successors in every respect of the said corporation, and defendant's said charter provided, that its period of existence should be fifty years

from and after the date of its incorporation, or to and until the first day of September, A. D. 1950.

This defendant further avers that within three months from the time it commenced to do business in the State of Idaho, to wit, on the fourth day of September, 1901, it designated B. S. Howe, a person residing in Ada County, Idaho, the county in which its principal place of business in Idaho is conducted upon whom process issued by authority of, or under any law of said State, might be served, and on said last-named date, filed such designation in the office of the Secretary of State of the said State of Idaho and in the office of the Clerk of the District Court of said County of Ada; and defendant further avers that within three months after the taking effect of the act of the legislature of Idaho approved March 10, 1903, relating to foreign corporations, it filed with the county recorder of said county of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said county recorder with the
21 Secretary of State of Idaho, and all of said designations have ever since remained and now are in full force, and said copies have ever since remained and are now on file in said offices.

II.

The defendant admits that the ordinance set forth in the third allegation of plaintiff's amended complaint was passed and adopted by said Boise City at the time and in the manner set forth in said allegation, but defendant denies that said ordinance was merely a license for an indefinite period to lay, construct or repair water-pipes in the streets and alleys of said city, but avers that said ordinance became, when acted upon by the grantees therein and their successors in interest, a franchise as hereinafter more fully set forth.

III.

The defendant admits the fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of said complaint.

IV.

The defendant denies that by reason of the enactment and approval of the ordinances mentioned in said complaint, or by its use or occupancy of the streets and alleys of Boise City with its water works system, it became or was on the first day of April, 1909, or at any other time, indebted to said Boise City in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

V.

The defendant admits the demands made upon it by plaintiff, and its refusal to pay the amounts demanded, as alleged in
22 the thirteenth allegation of said complaint, but denies that it was indebted to plaintiff on the first day of April, 1909, or at any other time, in the sum of ten thousand one hundred thirty dollars, or in any sum whatever.

VI.

And further answering said complaint, this defendant avers, that on the tenth day of July, 1890, the Mayor and Common Council of plaintiff, under authority contained in its charter and the general laws of Idaho, duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining waterpipes in the streets and alleys then laid out, or thereafter to be laid out and dedicated in said Boise City, a copy of which ordinance is hereto annexed, made a part of this answer, and marked Exhibit "A."

VII.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying said plaintiff and its inhabitants with water for public and family uses, and after the passage and approval of the ordinance mentioned in the sixth allegation hereof, the said Artesian Water and Land Improvement Company accepted the same and immediately proceeded thereunder and with due diligence, to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff
23 and its inhabitants with pure, fresh water for municipal, domestic and irrigation purposes. That up to the time said last named company sold and conveyed its said waterworks and property to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, it expended in the construction, extension and improvement thereof, over fifty thousand dollars.

VIII.

That after the passage and approval of the ordinance set forth in the third paragraph of plaintiff's amended complaint, the said H. B. Eastman and B. M. Eastman, accepted the same and immediately proceeded thereunder and with due diligence, to construct a water works plant or system, consisting of artesian wells, and reservoirs, and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance. That up to the time said Eastmans sold and conveyed their said waterworks plant and rights to the Artesian Hot and Cold Water Company, Limited, as hereinafter alleged, they had expended in the construction thereof over twenty thousand dollars.

IX.

That the Artesian Hot and Cold Water Company, Limited, was a corporation duly organized under said laws of the State of Idaho, relating to water and canal corporations, and was authorized by its articles of incorporation, to supply plaintiff and its inhabitants with water for municipal and domestic uses, and to purchase and
24 acquire the waterworks, wells, reservoirs, pipe-lines, properties, rights and franchises of the said Eastman Brothers and

said Artesian Water and Land Improvement Company. That on the 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, purchased for a valuable consideration the said Eastman Brothers waterworks system and all property belonging thereto and all rights, privileges and franchises granted to said Eastmans under the ordinance set forth in the third allegation of said complaint, and that on the said 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited, also purchased for a valuable consideration, the said waterworks system of said Artesian Water and Land Improvement Company, and all property belonging thereto and all rights, privileges and franchises granted to said company under the ordinance mentioned in the sixth allegation hereof, or by the laws of Idaho. That from and after the said 28th day of March, 1891, and until the sale of its waterworks and property in the year 1901, as alleged in the next allegation hereof, the said Artesian Hot and Cold Water Company, Limited, acting under authority of said ordinances and the said laws of Idaho, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, in all respects in accordance with said ordinance and as required by said laws of Idaho. That during the said period of time plaintiff's population increased from about three thousand to about six thousand inhabitants and the area thereof was greatly enlarged by the laying out and
25 platting of additions thereto, which were settled upon and occupied, and during said period said company with the plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city from time to time and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply, constructed two wells, and one reservoir for cold water, erected a large steam pumping plant with a capacity of 3,000,000 gallons per day and made improvements to its cold water plant aggregating in cost, more than one hundred and ninety-two thousand dollars.

X.

That on the 28th day of August, 1901, defendant purchased for valuable consideration, the entire waterworks system and plant of said Artesian Hot and Cold Water Company, Limited, including all of its wells, reservoirs, pumping plants, pipe-lines, pipes, real and personal property of every nature, and also all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the ordinances of plaintiff, hereinbefore referred to, and by the laws of Idaho. That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last named date, plaintiff's
26 population has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with

plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city, and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system, an additional sum of more than one hundred and forty thousand dollars.

XI.

That the supplying of water to said Boise City and its inhabitants by this defendant and its predecessors in interest and the use by them of its streets and alleys during the past twenty years has been under authority of said ordinances and the laws of Idaho, before referred to, and was and is an important public service of great benefit to said plaintiff and its inhabitants and was the consideration for which plaintiff granted said franchises, as aforesaid, and it was upon the faith of said grants and the reliance thereon that defendant and its grantors made the expenditures aforesaid, but defendant avers that at the time of the passage of said ordinance mentioned in the sixth allegation of said complaint, the said plaintiff and its mayor and common council claimed and have ever since claimed
27 that said grants to said Eastmans and said Artesian Water and Land Improvement Company were and are mere licenses which may be revoked or annulled at the will of said common council and that said common council may compel this defendant to discontinue its business of supplying water and of using said streets and alleys therefor, or subject it to the payment of said license fee or any other burdens for such privilege, and said common council enacted said license tax ordinance on this ground only, but this defendant avers that said grants, when accepted and acted upon by defendant and its grantors, as aforesaid, became and are franchises and binding contracts between plaintiff and defendant for the purposes aforesaid.

XII.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, as aforesaid, their waterworks and all property, both real and personal owned by them in the Territory and State of Idaho, have been duly assessed for payment of all state and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against its property.

XIII.

That on the 11th day of May, 1905, pursuant to section
28 2711 of the Revised Statutes of Idaho, and the Act approved March 9th, 1905, amendatory thereof, two commissioners

were appointed by the Mayor and Common Council of said plaintiff and two commissioners were thereafter appointed by this defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and continued in session over two months, and adopted a schedule of rates to be charged by defendant for all of said purposes, as required by said statute. That the plaintiff and defendant were represented by counsel before said commission and a large amount of evidence was introduced and the said commission carefully investigated the value of defendant's waterworks plant and reasonable operating expenses and deterioration thereof and fixed rates to be charged said city and its inhabitants for water at figures which were intended to yield to defendant, a net return of six per cent per annum, upon the then value of its plant, and defendant avers that said rates have not up to the present time and will not, in the future, to the best of defendant's information and belief, yield to defendant any greater net return.

That the said rates, adopted by said commission went into effect on the first day of August, 1905, and were accepted by plaintiff and defendant, and ever since have been and now are in full force and effect, and have never been repealed or modified, and, under the provisions of said statutes, will continue in force until new rates are established. That this defendant has at all times acquiesced
29 in the rates fixed by said commission, and regulated its charges in accordance therewith.

That the license tax levied by said plaintiff against this defendant under the ordinance mentioned in the sixth allegation of said complaint was not considered or contemplated by said commissioners in fixing said rates to be charged by this defendant, and the enforcement and collection of said license tax as prayed for in said complaint will reduce the defendant's net income to an amount considerably less than that fixed by said commission and which would be entirely inadequate, unreasonable and unfair and which would amount to confiscation of defendant's property.

XIV.

This defendant further avers that the Capital Water Company is a corporation organized under said laws of Idaho, relating to water and canal corporations, for the purpose of supplying said Boise City and its inhabitants with water, and said company is now and for a long time past has been engaged in the business of supplying water to plaintiff and its inhabitants for municipal, domestic and other useful purposes, under ordinances granted by plaintiff and under the said laws of Idaho, and said company is using and occupying the plaintiff's streets and alleys with its pipes and mains in the same manner and for the same purposes as this defendant, but said company is not required by the said plaintiff by ordinance or otherwise to pay any license or tax whatever for such privileges, and there are also numerous other individuals, associations and corpora-
30 tions using plaintiff's streets and alleys for the purpose of supplying plaintiff and its inhabitants with electric lights

and gas and for street railroad, telegraph and telephone purposes, none of whom are required by plaintiff to pay any license or tax for the privilege of carrying on their business or using said streets and alleys.

XV.

This defendant further avers that by reason of the premises, the said ordinance mentioned in the sixth allegation of said complaint, as sought to be enforced by said plaintiff in this action, will impair and destroy the said franchises and contract rights of this defendant and the obligations thereof, and is therefore in contravention of the provisions of article I, section 10, of the Constitution of the United States, forbidding any legislation impairing the obligation of contracts, and is invalid; and that the enforcement of said ordinance will deprive this defendant of its property without due process of law and deny to this defendant the equal protection of the laws, in violation of the Federal Constitution of the Fourteenth Amendment thereto, and that said ordinance amounts to double taxation of defendant's property, and is unreasonable and oppressive and is in violation of the constitution and laws of the State of Idaho.

31 Wherefore, this defendant prays that it may be hence dismissed with its costs and disbursements incurred herein.

RICHARD H. JOHNSON AND
EDGAR WILSON,
Attorneys for Defendants, Residence, Boise, Idaho.

RICHARD Z. JOHNSON,
Of Counsel.

STATE OF IDAHO,
County of Ada, ss:

Benjamin S. Howe, being first duly sworn, deposes and says that he is an officer, to wit, the Secretary of the above-named defendant and makes this verification for and on behalf of said defendant. That he has read the foregoing answer and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be on his information or belief, and as to those matters that he believes it to be true.

[SEAL.] B. S. HOWE.

Subscribed and sworn to before me this 14th day of May, 1909.

RICHARD H. JOHNSON,
Notary Public.

EXHIBIT "A" [TO ANSWER TO AMENDED COMPLAINT].

An Ordinance Granting to the Artesian Water and Land Improvement Company, the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

SECTION 1. The privilege of laying down and maintaining
32 water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

SECTION 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

SECTION 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

I hereby acknowledge service of a copy of the foregoing Answer to Amended Complaint this 18th day of May, 1909.

F. B. KINYON,
City Attorney and Attorney for Plaintiff.

[Endorsed:] Filed May 18, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

33 *Motion to Strike.*

Comes plaintiff and moves to strike from the answer of the defendant herein the following:

I.

To strike from paragraph I of said answer all that portion thereof beginning with the word "and," at the end of line one and ending with the words, "September, A. D. 1950," at the end of line fourteen on the first page thereof, for the following reasons:

a. For the reason that said allegations are irrelevant and have no substantial relation to the question in controversy, and can in no event affect the decision of the Court.

b. That in the particulars set forth under *a* said matter is redundant.

II.

To strike from said answer that portion of paragraph VII, beginning in line thirteen with the words "that up to the time," and thence to the end of said paragraph VII, for the reasons set forth in paragraph I hereof, reference to which is hereby made.

III.

To strike from paragraph VIII of said answer that portion thereof beginning with the words "That up to the time," in line nine thereof, and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

IV.

To strike from paragraph IX of said answer that portion
34 thereof beginning in line thirty of said paragraph being line seven on page six of said answer, with the words, "that during the said," and thence to the end of the paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

V.

To strike from said paragraph IX of said answer that portion thereof beginning in line thirty-eight thereof, and being line fifteen on page six, with the words, "that during said period," and thence to the end of said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VI.

To strike from paragraph X of said answer that portion thereof beginning with line fifteen, being line eight on page seven, with the words, "that since said last named," and thence to the end of the said paragraph, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VII.

To strike from said answer the whole of paragraph XIII, for the reasons set forth in the first paragraph hereof, reference to which is hereby made.

VIII.

To strike from said answer the whole of paragraph XIV, for the reasons and upon the grounds set forth in the first paragraph hereof, reference to which is hereby made.

Wherefore, etc.

F. B. KINYON,
Attorney for Plaintiff, Residing at Boise, Idaho.

35 . Service of the within and foregoing Motion to Strike, with copy, admitted this 17th day of June, 1909.

EDGAR WILSON AND
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed:] Filed June 17th, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Demurrer.

Comes the plaintiff and without waiving its motion to strike filed herein, files this its demurrer to the answer of the defendant herein and for ground thereof alleges:

I.

That said answer does not state facts sufficient to constitute a defense.

II.

That said answer is uncertain in that it cannot be deter-
36 mined therefrom whether the clause "Laws of the State of Idaho," as used in paragraphs 9, 10, 11 and 14, refers to Title Four of the Revised Codes relating to corporations or whether it refers to Section 2711 of the Revised Statutes of Idaho, and the Act approved March 9, 1905, amendatory thereof, or whether it refers to Chapter Five of Title Four of the Civil Code of Idaho relating to Water and Canal corporations, whether the same refers to still other Laws of the State of Idaho.

III.

That said answer is ambiguous for the reasons assigned in paragraph II, hereof relating to uncertainty.

IV.

That said answer is unintelligible for the reasons assigned in paragraph II, hereof relating to uncertainty.

Wherefore, etc.

F. B. KINYON,
Attorney for Plaintiff, Residing at Boise, Idaho.

Service of the within demurrer, with copy admitted this 17th day of June, 1909.

EDGAR WILSON AND
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed:] Filed June 17, 1909. A. L. Richardson, Clerk.

37 *Ordinance No.* 699.

By Councilman Davis.

An Ordinance Ordering and Requiring the Proper Officers of Boise City, Idaho, to Institute an Action Forthwith in any Court of Competent Jurisdiction for the Enforcement and Collection of all Sums or Amounts of Money Due said Boise City under the Provisions of Ordinance 678, Enacted and Approved by said City on June 7, 1906.

Boise City does ordain as follows:

SEC. 1. That the proper officers of Boise City, Idaho, are hereby instructed, required and ordered to institute forthwith an action for and on behalf of and in the name of said Boise City in any court of competent jurisdiction for the enforcement and collection of all sums or amounts of money due said Boise City, under provisions — Ordinance 678, enacted and approved by said Boise City, on June 7, 1906.

SEC. 2. This Ordinance shall take effect and be in force from and after its passage and approval.

Passed by the Common Council of Boise City, Idaho, this 6th day of December, 1906.

Approved by the Mayor of Boise City, Idaho, this 6th day of December, 1906.

Approved.

JAS. A. PINNEY, *Mayor.*

Attest:
E. L. SAVIDGE,
City Clerk.

38 I, Emily L. Savidge, City Clerk of Boise, Idaho, hereby certify that the above and foregoing is a true and correct copy of original Ordinance 699, passed — the common council December 6, 1906, approved by the Mayor December 6th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City, Idaho, this 27th day of December, 1906.

[SEAL.]

E. L. SAVIDGE,
City Clerk.

[Endorsed:] Filed June 30, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, (a Corporation), Defendant.

Stipulation [*Filed October* 23, 1909] *of Facts.*

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be used on the final trial hereof before the court, a jury being expressly waived herein.

39 1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegations of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states, that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation- of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to, is hereby admitted to be true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest in furnishing such water complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

40 6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were after August 1, 1905, and still are charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said commission in fixing said
41 rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is by its terms limited to endure for a period of fifty years, and plaintiff reserves its legal objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefore, prior to the passage of said Ordinance No. 678, which is hereto attached, marked Exhibit 1, and is admitted in evidence.

11. It is admitted that plaintiff has made due and proper
42 demand upon defendant for the payment of the amount prayed for in said complaint and that defendant has paid no part thereof.

Dated October 22, 1909.

F. B. KINYON AND
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed:] Filed October 23, 1909. A. L. Richardson, Clerk.

EXHIBIT No. 1.

Ordinance #678.

By Councilman Davis.

An Ordinance Requiring the Boise Artesian Hot and Cold Water Company, a Private Corporation, Organized and Existing under and by Virtue of the Laws of the State of West Virginia, to Pay to Boise City, a Municipal Corporation of the State of Idaho, on the First Day of Each and Every Month, a Monthly License of $300.00 for the Use and Occupancy of the Streets and Alleys of said Boise City, Idaho, in Furnishing Water to the Residents of said City.

Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and,

43 Whereas, the Boise Artesian Hot and Cold Water Company is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said Company to the residents of said City for profit, and

Whereas, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, Therefore, Boise City does ordain as follows:

Section 1. That, The Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month, a monthly license of $300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-pipes in the streets and alleys of said City through

44 which water is being furnished to the inhabitants of said Boise City by said Company.

Section 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300.00 required by Section 1 of this Ordinance.

Section 3. That, the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise

rtesian Hot and Cold Water Company of the requirements of this rdinance to pay said license as aforesaid.

Section 4. That nothing in this ordinance shall be construed or nderstood as granting any privilege or authority for any other rm than that provided for in the aforesaid Ordinance of October 1899.

Section 5. This Ordinance shall take effect and go in force from nd after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of ay, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; noes.

Attest:

EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and regoing is a true and correct copy of Ordinance No. 678 passed by the common Council of Boise City, the 31st day of May, 1906, vetoed by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and file in this office.

Given under my hand and the seal of Boise City, this 26th day of ly, 1906.

[SEAL.] EMILY L. SAVIDGE,
City Clerk.

[Endorsed:] Filed June 30, 1909. A. L. Richardson, Clerk.

the Circuit Court of the United States for the District of Idaho, Central Division.

OISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,

vs.

HE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Stipulation [Re Submission of Demurrer, etc.].

It is hereby stipulated by and between the parties to the above-titled action, through their attorneys herein:

1. That the demurrer to defendant's answer and the motion to rike out parts of said answer heretofore filed may be argued and bmitted together at the hearing of said cause in Portland, Ore-n, on July 12th, 1909, before Honorable William B. Gilbert, United States Circuit Judge for the Ninth Judicial Circuit, the court having heretofore expressed its approval.

2. That the copy of the Ordinance of said Boise City No. 8, mentioned in paragraph VI of plaintiff's amended complaint,

certified by the City Clerk of said Boise City on the 26th day of June, 1906, may be filed herein and used on the trial of this action, and copies of any other ordinances so certified, that counsel may desire to introduce, may be so filed in evidence.

3. That the ordinance granted by plaintiff to the Capital Water Company, mentioned in paragraph XIV of defendant's answer, was specified to continue for fifty years from the time it was passed by the city council.

F. B. KINYON,
Attorney for Plaintiff.
EDGAR WILSON AND
JOHNSON & JOHNSON,
Attorneys for Defendant.

[Endorsed:] Filed June 30, 1909. A. L. Richardson, Clerk.

47 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Opinion [*Filed July* 29, 1909].

Frank B. Kinyon, for the Plaintiff.
Johnson & Johnson and Edgar Wilson, for the Defendant.

The plaintiff brings an action against the defendant alleging that on October 3, 1899, the plaintiff, by its mayor and common council, adopted an ordinance which provides as follows: "Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys, in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom"; that the ordinance granted a
48 license for an indefinite period, and that it was accepted by the grantees thereof; that the defendant became the successor in interest of the said H. B. and B. M. Eastman; that the defendant and its predecessors in interest are now, and ever since October 3, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and the residents of said city; that the plaintiff on June 7, 1906, enacted and approved an ordinance requiring the said defendant to pay plaintiff on the first day of each month, a monthly license of $300, for the use and occupancy of the streets and alleys of said city by the defendant in the

ale and delivery of water to the plaintiff and the inhabitants of said ity, and for the privilege granted by said ordinance of October 3, 889; that demand has been made upon the defendant for the pay- nent of said monthly license, but payment has been refused. Judg- nent was demanded for the sum of $10,130. The defendant an- wered, alleging that on July 10, 1890, the mayor and common coun- il of plaintiff duly passed an ordinance granting to the Artesian Water and Land Improvement Company, a corporation and its suc- essors and assigns, the privilege of laying down and maintaining vater-pipes in the streets and alleys then laid out or thereafter to be aid out, and dedicated in said Boise City; that said corporation ac- epted the same and immediately proceeded thereunder with due liligence to sink artesian wells, construct reservoirs, and lay pipes nder and along the streets and alleys of said city to supply it and its inhabitants with water, and therein expended over $50,000; 9 that the said H. B. and B. M. Eastman accepted the ordinance of October 3, 1889, laid their water mains and pipes under nd along the streets of said city and up to the time they conveyed heir plant to the defendant, they had expended thereon the sum of 20,000; that on March 28, 1891, the Artesian Hot and Cold Water Company, Limited, became the owner by purchase of the rights of aid Eastman Brothers and of the said Artesian Water and Land Improvement Company, and since said date has supplied water to aid city and its inhabitants and has improved its plant at an ex- ense of $192,000; that on August 28, 1901, the defendant became he owner by purchase of the entire waterworks system and plant of he Artesian Hot and Cold Water Company, Limited, and since said late has supplied the plaintiff and its inhabitants with water and herein has expended $140,000, and the defendant alleges that the plaintiff and its mayor and common council *has* claimed and are claiming that the defendant is a mere licensee under a license which may be revoked or annulled at the will of said common council, and the defendant avers that said ordinances when accepted and acted upon by the defendant and its grantors became and are franchises and binding contracts between the plaintiff and defendant; that the defendant during the whole time of its engagement in the business of supplying water, has paid its due proportion of taxes, State, county, city and school taxes upon all its property in said city, and has charged and received water rates in accordance with the 50 rate duly established by commissioners appointed under section 2711 of the Revised Statutes of Idaho, and the Act of March 9, 1905. To the answer the plaintiff demurs on the ground that the facts stated therein constitute no defense to the cause of action alleged in the complaint.

GILBERT, *Circuit Judge* after stating the case:

The Circuit Court of Appeals for this Circuit had occasion to construe the ordinance of October 3, 1889, granting to the Eastman Brothers and their successors in interest in their waterworks, authority to lay and repair their water-pipes in and through the streets and alleys of Boise City, and held that since no term was specified in

the ordinance for the enjoyment of the privilege so granted, it was a grant of a license only, legalizing such use of the streets for supplying water until such time as the city might see fit to terminate the privilege. Boise City Artesian Hot and Cold Water Co. v. Boise City, 123 Fed. 232. This was held under the doctrine, sustained by the decided weight of authority, that a municipal corporation has no power to grant a franchise in perpetuity unless it is expressly authorized by the legislature. 28 Cyc. 875; Logansport Ry. Co. v. Logansport, 114 Fed. 688; Detroit v. Detroit City R. Co., 56 Fed. 867; Girhingham etc. Street Ry. Co. v. Birmingham Street R. Co., 79 Ala. 465. Section 2710 of the Revised Statutes of Idaho, 1887, refer-ing to water and canal corporations, and providing that no contract or grant must be made for a term exceeding 50 years, was not deemed applicable to the case for the reason that the Eastman ordinance was a grant of a privilege to individuals and not to a
51 corporation. In construing that section of the statutes, the Supreme Court of Idaho in Jack v. Village of Grangeville, 9 Idaho, 291, held that it had no application to individuals or natural persons. See, also, Santa Ana Water Co. v. Town of San Buena Ventura, 56 Fed. 339. But in the present case, a different question is presented, for the Court is called upon to construe the ordinance of July 10, 1890, granting to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, "The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated to Boise City." This ordinance is not more inclusive than the ordinance granting the privilege to Eastman Brothers, the predecessors in interest of the Artesian Water and Land Improvement Company, and, like that ordinance, it contains no expression of the will of the common council as to the term or duration of the granted right. The defendant contends that the omission is to be filled by reading into the ordinance the prohibition of section 2710 of the Revised Statutes that no contract or grant to a corporation "must be made for a term exceeding 50 years," and that thereby it is made a franchise for 50 years. This is the crucial question in the case, upon the answer to which depends the disposition of the demurrer.

There is a line of cases which hold that where a municipal corporation grants a franchise or enters into a contract permitting the use of its streets for a fixed period longer than that which is allowed by law, the contract is wholly void as ultra vires, and will not
52 be sustained for any period whatever. Thus in Sullivan v. Bailey, 83 N. W. 996, the Supreme Court of Michigan held that under a city charter conferring power on the common council to contract to supply its inhabitants with water and light, and granting the use of the streets for those purposes for a period not exceeding ten years, the common council cannot grant a franchise for the use of the streets for a longer period than ten years for those purposes, and that the grant of a franchise for thirty years was void. So in Gaslight & Coke Co. v. City of New Albany, 156 Ind. 406, under a statute which authorized the municipal corporation to make contracts for lighting its streets for a term not exceeding ten years, a

franchise given by ordinance for a period of twenty years was held to be wholly invalid, and not to be allowed to stand for the ten years authorized by statute. Said the Court: "The contract here with respect to duration involves but a single proposition, a single and specific term of twenty-three years, which, from its indivisible nature, must either stand or fall as an entirety." The same was held in City of Wellston v. Morgan, 59 Ohio St. 147; Town of Kirkwood v. Meremac Highlands Co., 94 Mo. App. 637; City of Somerset v. Smith (Kentucky), 49 S. W. 456; State ex rel. Davis. v. Harrison, 46 N. J. L. 79; Humphreys v. Mayor of Bayonne, 55 N. J. L. and Manhattan Trust Co. v. City of Dayton, 8 C. C. A. 140.

But it would seem that, upon principle, there is a distinction to be observed between cases where the municipality grants a fran-
53 chise for a fixed period of time in excess of that which the law permits, and cases where it grants a franchise for an indefinite period under a law which places a limit upon the life of such a franchise. In the first class of cases, there must be imputed to the municipal authorities and the contracting parties a violation of the law and there is good ground for saying that the contract is ultra vires and wholly void, and that a Court may not lop off the excess of time so granted and hold the franchise good for the term for which it might lawfully have been given. In the second class of cases, it is reasonable to hold that there was absence of intention to disregard the law, that the franchise was granted in view of the existing statutory limitation fixed upon its life, and that the ordinance granting it being silent as to its duration, the omission is to be supplied by a reference to the statute. It is true that in Blaschko v. Wurster, 156 N. Y. 447, the Court refused to sustain as valid for the period limited by the statute a grant of a franchise for an indefinite time. In that case, the charter provided that no franchise or right to use the streets of the city could be granted for a longer period than twenty-five years. It was held that a resolution of the aldermen granting consent to a railroad company to operate in certain streets without any limitation as to time was not a valid exercise of the power to grant consent for twenty-five years, and hence was not good as a consent for twenty-five years, but was void. But in People ex rel. Flatbush Gas Co. v. Coler et al., 103 N. Y. S. 590, the court declined to follow the Blaschko case, and held
54 that under the Greater New York charter forbidding the grant of any franchise to use the streets for a period longer than twenty-five years, where a company has laid electric wires and furnished light to the city and others for ten years under a contract with the commissioners of parks giving it the right to do so, without limiting the time, the contract is valid for the exercise of the right for twenty-five years from its date. Referring to the decision in Blaschko v. Wurster, the court said that the franchises attempted to be granted there were clearly an attempt to evade the provisions of the Greater New York charter, which was about to go into effect, that the circumstances of the granting evidenced bad faith, and a deliberate breach of duty on the part of the authorities, and that for these reasons the contracts had been held void, and the court had

refused to consider the grant good even for twenty-five years. "Like reasons, however," said the Court, "cannot apply here where the Gas Company has been operating under some kind of a franchise for ten years with the consent and approval, and for the benefit of the city." The Court of Appeals, 190 N. Y. 268, reversed the decision in People ex rel. Flatbush Co. v. Coler, solely on the ground that the common council and not the commissioner of public parks was the proper authority to give consent to the use of the streets. A case directly in point is Old Colony Trust Co. v. City of Wichita, 123 Fed. 762, affirmed by the Circuit Court of Appeals for the Eighth Circuit in 132 Fed. 641. In that case one of the questions involved was the length of the life of an ordinance
55 granting to a telephone company the right to maintain its poles and wires in the streets of a city, no term being stated in the ordinance. The Court held, and it seems to have been assumed by counsel for both parties that the life of the privilege granted was twenty years. This was held under the provisions of General Statutes of Kansas, 1889, section 555, wherein, in defining the general powers of the mayor and council of incorporated cities, the legislature coupled the grant of power to permit the use of streets for water, light and power purposes, with the proviso that no franchise or right of way or privilege of any character should be granted for a longer period than twenty years.

It is not reasonable to suppose that the City of Boise intended to grant as a mere license, subject to recall at any time, a privilege such as that which is embodied in the ordinance under consideration, or that the grantee thereof would have accepted it on that understanding, or on that understanding would have incurred the expense of installing its water plant. The conclusion that it was in law such a license, should be reached by a Court only when confronted with the alternative of choosing between the two constructions, one that it is a more license, the other that it is a grant in perpetuity. It was in the face of that alternative that the Court in Boise City Artesian Hot and Cold Water Co. v. Boise City held that the grant of the Eastman Brothers must, in law be deemed a license. Upon a careful consideration of the question here involved, and the authorities applicable thereto, and in view of the fact that the privilege so granted is not exclusive and does
56 not stand in the way of the city's granting like privileges to others, or instituting its own water plant and supply, I am inclined to the opinion that the ordinance under consideration, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years, which may not be impaired by the imposition of a license tax upon the use of the streets for the purposes for which it was so created, and that the demurrer should be overruled.

[Endorsed:] Filed, July 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Order [on Motion to Strike].

This cause having been submitted upon a motion to strike out portions of the answer, and upon a demurrer to the answer, the plaintiff appearing by Frank B. Kinyon, its attorney, and the defendant appearing by Johnson & Johnson and Edgar Wilson, its attorneys, the Court being now fully advised in the premises,—

57 It is ordered, that the said motion be allowed as to that portion thereof directed to paragraphs 8 and 14 of said answer, and as to the remainder thereof disallowed, and that the demurrer be, and is hereby overruled.

WM. B. GILBERT,
Circuit Judge.

[Endorsed:] Filed July 29, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LTD. (a Corporation), Defendant.

Opinion [Filed April 1, 1910].

F. B. Kinyon, City Attorney for Boise City; Cavanah & Blake, for the Plaintiff.
Johnson & Johnson, for the Defendant.

GILBERT, *Circuit Judge:*

By the stipulation of the parties, this case is submitted for trial without a jury, and for judgment upon the pleadings and an agreed statement of the facts. The action is brought by the plaintiff to recover certain license fees charged against the defendant for the use and occupancy of the streets and alleys of the city in the sale

58 and delivery of water to the plaintiff and its inhabitants, under an ordinance approved on June 7, 1906. The defendant denied its liability on the ground that on July 10, 1890, the mayor and common council of the plaintiff had, by ordinance, granted to the defendant's predecessor in interest, a corporation, and

to its successors and assigns, the privilege and franchise of laying down and maintaining water-pipes in the streets and alleys then laid or thereafter to be laid out and dedicated in the city, and that the franchise had been accepted and acted upon and used in compliance with its terms, and among other matters pleaded in defense, the defendant alleged that on May 11, 1905, pursuant to section 2711 of the Revised Statutes of Idaho, and the Act approved March 6, 1905, amendatory thereof, two commissioners were appointed by the mayor and common council of the plaintiff, and two commissioners were thereafter appointed by the defendant for the purpose of fixing and determining the rates to be charged for water for domestic, municipal and other purposes in said Boise City. That said commissioners duly met and organized and adopted a schedule of rates to be charged by the defendant for all of said purposes as required by said statute, which schedule was adopted upon consideration and investigation of the value of the defendant's waterworks plant and reasonable operating expenses and deterioration thereof, as fixed rates to be charged the said city and its inhabitants at figures which were intended to yield to the defendant a net return of six per cent per annum upon the then value of its plant, and that said rates have not, up to the present time, and will not
59 in the future, to the best of defendant's information and belief, yield the defendant any greater net return. That the said rates so adopted went into effect on August 1, 1905, and were accepted by both plaintiff and defendant, and ever since have been and now are in full force and effect, and will continue in force until new rates are established, and that the defendant has at all times acquiesced in said rates. A demurrer to the answer was interposed on the ground that the right so granted was a license merely, revokable at the will of the grantor, for the reason that no period for its duration had been expressed in the ordinance, and that the facts stated in the answer constituted no defense to the cause of action alleged in the complaint. It was held upon the demurrer that section 2710 of the Revised Statutes of Idaho, 1887, referring to water and canal corporations, and providing in general terms that "no contract or grant must be made for a term exceeding fifty years," was to be referred to as determining the length of life of the franchise, and that the term of fifty years so fixed, should be read into the ordinance as a part thereof.

The plaintiff now directs attention to a decision of the Supreme Court of Idaho of date February 18, 1909, Boise City Nat. Bank v. Boise City, 100 Pac. 93, the effect of which, it is said, is to hold that a general statute of the state, such as that embodied in section 2710 has no application to a city incorporated under a special charter. The question involved in that case was whether the act of the legislature of February 24, 1905, which was an act to provide for
60 the issuance of bonds for improvements of streets and laying of sewers in incorporated cities, towns and villages, and for the payment of costs of such improvement and sewers, by installments, and making the provisions thereof applicable to cities, towns and villages which have levied special assessments for improvements

or for laying sewers, was a statute which in any way controlled or related to the action of the officials of Boise City in issuing local improvement bonds for sewer districts. It was held that it did not, and that the action of the officials of Boise in issuing such bonds was controlled only by the special charater of Boise City, as amended on February 22, 1907, wherein was provided a complete system for buliding sewers, assessing the property benefited, and collecting from the property owners the cost thereof, which method the act declared should be exclusive. And the Court held that, while the Act of 1907, contained no repeal of any of the provisions of the Act of 1905, and was not as full and complete as it ought to be in regard to the making of improvements, and the Act of 1905 was not inconsistent with it, but merely went further and gave additional powers, yet the omission was nevertheless intentional, that the provisions of the general law of 1905 had no application to the new charter, but applied to cities and towns organized under a general law and not to those organized under special charters, that the State constitution contemplates that special charter shall be amended by special acts only, and that the general laws relating to the local government of a city cannot be made to apply to Boise City without the
61 consent of a majority of the electors. I am unable to see that the decision has any appreciable bearing upon the question here involved. Section 2710 of the Revised Statutes of 1887 is not a statute defining the powers of incorporated cities, towns and villages, but is a general statute of the state, declaring a rule of public policy with reference to all canal and water corporations of the state, limiting the life of the contracts which may be made with them for the supply of water for the use of incorporated towns and cities of the state. It is found in the statutes under the title "Corporations," a title which deals with the powers and the regulation of railroad companies, telegraph and telephone companies insurance companies, surety and fidelity companies, banking corporations, gas corporations, and all other kinds of incorporated companies. It declares: "No corporation formed to supply any city or town with water, must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years." The State constitution provides that the right to collect rates or compensation for the use of water supplied to any county, city or town, or water district, or the inhabitants thereof, is a franchise, and cannot be exercised except by au-
thority of, and in the manner prescribed by law." It cannot
62 be doubted that section 2710 applies to all water companies in their contracts with all municipal corporations, whether the latter are incorporated under the general law or under a special charter, and contains the whole expression of the legislative will on the subject. It expressly limits the power of all municipal corporations to deal with water companies. No water company may furnish

water to a town or city, under whatever authority incorporated, unless previously authorized by an ordinance, or a contract, and to no such corporation can any exclusive right be granted, or any right for a longer period than fifty years. No legislation on the subject so referred to is found in the general laws providing for the incorporation of towns and cities or in the charter of Boise City. Section 2711 provides that a water company receiving and accepting the privileges conferred by section 2710, shall furnish a city or town water for fire purposes and other great necessities, free. In the City of Boise v. Artesian Hot & Cold Water Co., 4 Idaho, 351, a suit brought under sections 2711 and 2712, to compel the defendant to furnish the city with free water for fire purposes, the court expressly recognized the applicability of section 2710 to the City of Boise, and held that the plaintiff's complaint must set forth substantially the ordinance or contract with the city, permitting the company to furnish the water, and regulating the manner thereof as provided in that section. The decision, in brief, distinctly holds that the provisions
of the chapter referring to water and canal corporations is
63 applicable to the city of Boise, and I deem it a controlling decision upon the question here under consideration.

Judgment will be rendered for the defendant.

[Endorsed:] Filed April 1, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Findings of Fact and Conclusions of Law.

This action coming regularly on for trial, before the Court, without the intervention of a jury, a stipulation in writing waiving a jury having been filed with the clerk by the attorneys for the respective parties, F. B. Kinyon, Esq., City Attorney of plaintiff and Messrs. Cavanah and Blake, appearing as the attorneys for the plaintiff, and Messrs. Johnson & Johnson, appearing as attorneys for the defendant, and stipulations containing an agreed statement of the facts having been filed and the case having been argued by the attorneys for the respective parties and submitted to the court for judgment upon
the stipulations of fact and the pleadings and the Court, hav-
64 ing duly considered the same, and being fully advised in the premises and having heretofore, on the first day of April 1910, rendered and filed its opinion in writing herein:

Now, in accordance therewith the Court hereby makes and renders its decision, finding the following facts and conclusions of law herein:—

Findings of Fact.

I.

The plaintiff, Boise City, is now, and at all times herein mentioned, was, a municipal corporation within Ada County, Idaho, created by and existing under the laws of Idaho and operating under a special charter, granted by the Legislature of the Territory of Idaho in the year 1863, and subsequent amendments thereto.

II.

That the defendant is a private corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business at Boise City, Ada County, State of Idaho, and is authorized and empowered by its articles of incorporation to carry on and conduct a waterworks system and to sell and rent water to the inhabitants of the said Boise City, and to take, purchase, acquire, hold, operate and maintain rights and privileges of water companies, associations or corporations, and to acquire, use, own and operate all properties, franchises, rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be the successors in every respect of said corporation, and its charter provides that its
65 period of existence shall be fifty years from and after the date of its incorporation, or to and until September 1, 1950.

That the defendant, within three months from the time it commenced to do business in the State of Idaho, to wit, on the 4th day of September, 1901, designated B. S. Howe, a person residing in Ada County, Idaho, the County in which its principal place of business in Idaho is conducted, upon whom process issued by authority of or under any law of said State, might be served, and on said last named date filed such designation in the office of the Secretary of State of Idaho and in the Office of the Clerk of the District Court of said County of Ada, and within three months after taking effect of the act of the Legislature of Idaho, approved March 10, 1903, relating to foreign corporations, it filed with the County Recorder of said County of Ada, a copy of its articles of incorporation, duly certified to by the Secretary of State of West Virginia, and also filed a copy thereof, duly certified by said County Recorder, with the Secretary of State of Idaho, and all of said designations have ever since remained and now are in full force and said copies have ever since remained and are now on file in said offices.

III.

That on the 3d day of October, 1889, said plaintiff, Boise City, by its Mayor and Common Council, passed and adopted the following ordinance, to wit:

"An Ordinance Granting Eastman Brothers the Right to Lay Water-pipes in Boise City.

66 The Mayor and Common Council of Boise City, Idaho, ordain:

SECTION 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes, in, through and along and across the streets and alleys of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

SECTION 2. This Ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

IV.

That the plaintiff, Boise City, on the 10th day of July, 1890, by its Mayor and Common Council, passed and adopted the following ordinance, to wit:

"An Ordinance Granting to the Artesian Water and Land Improvement Company the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

SECTION 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to
67 the Artesian Water and Land Improvement Company, its successors or assigns.

SECTION 2. All water-pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

SECTION 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890."

V.

That the said Artesian Water and Land Improvement Company was a corporation duly organized under Chapter V of Title IV of the Civil Code of Idaho, relating to water and canal corporations, for the purpose of supplying plaintiff and its inhabitants with water for public and family use.

VI.

That after the passage and approval of the Ordinance mentioned in Finding III hereof, the said Eastman Brothers proceeded immediately to construct a waterworks plant and system consisting of artesian wells and reservoirs and laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its in-

abitants with pure mountain water in accordance with said ordi-
ance.

That up to the time said Eastmans sold and conveyed their water-
orks plant and rights to the Artesian Hot and Cold Water Com-
any, Limited, they had expended in the construction thereof over
'wenty Thousand Dollars.

VII.

That after the passage and approval of the ordinance men-
tioned in Finding IV the said Artesian Water and Land Im-
rovement Company proceeded immediately thereunder to sink
rtesian wells, construct reservoirs and lay pipes under and along
laintiff's streets and alleys and to supply plaintiff and its inhabi-
ants with pure, fresh water for municipal, domestic and irrigation
urposes.

That up to the time this company sold and conveyed its water-
orks and property to the Artesian Hot and Cold Water Company,
imited, it expended in the construction, extension and improve-
ment thereof over Fifty Thousand Dollars.

VIII.

That the Artesian Hot and Cold Water Company, Limited, was
a corporation duly organized under Chapter V of Title IV of the
Civil Code of Idaho, relating to water and canal corporations and was
authorized by its articles of incorporation to supply plaintiff and its
inhabitants with water for municipal and domestic uses and to pur-
chase and acquire the waterworks, wells, reservoirs, pipe-lines, prop-
erties, rights and franchises of the said Eastman Brothers and said
Artesian Water and Land Improvement Company.

IX.

That on the 28th day of March, 1891, the said Eastman Brothers
and the said Artesian Water and Land Improvement Company sold
and conveyed to said Artesian Hot and Cold Water Company,
Limited, each of their waterworks systems and all property belong-
ing thereto and all rights, privileges and franchises granted
to them respect*ful*-ly by the ordinances set forth in Findings
III and IV.

X.

That on the 28th day of August, 1901, the said Artesian Hot and
Cold Water Company, Limited, sold and conveyed to the defendant
its entire waterworks systems and plant, including all of its wells,
reservoirs, pumping plants, pipe-lines, pipes, real and personal prop-
erty of every nature, and also all of the rights, privileges and fran-
chises which had been granted to it and to its predecessors in interest
by the Ordinances of Boise City.

XI.

That during the time between the 28th day of March, 1891, and
the 28th day of August, 1901, the said Artesian Hot and Cold Water

Company, Limited, supplied plaintiff and its inhabitants with pure, fresh water for municipal, domestic and other useful purposes, and during said time the population of Boise City increased from about three thousand to about six thousand inhabitants, and the area thereof was greatly enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during said period said Artesian Hot and Cold Water Company, Limited, with plaintiff's knowledge and consent, extended its pipe-lines under the streets and alleys of said city, from time to time, and supplied said additions with water to meet the demands therefor. That during said period said Company laid about fifteen miles of additional pipe-lines for cold water supply, constructed two wells and one reservoir for cold water, erected a large steam pumping plant with a capacity of three million gallons per day and made improvements to its cold water plant aggregating in cost more than one hundred and ninety-two thousand dollars.

XII.

That at all times since said 28th day of August, 1901, this defendant has supplied to plaintiff and its inhabitants, by virtue of said ordinances and laws, and with plaintiff's knowledge, acquiescence and consent, pure, fresh water for municipal, domestic and other useful purposes in accordance with said ordinances and in full compliance therewith and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about six thousand to over twenty-five thousand inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent, has extended its cold water system to meet the growth of said city and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system an additional sum of more than one hundred and forty thousand dollars.

XIII.

That the defendant and its predecessors in interest in and to its waterworks system are now, and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water-pipes connected with said waterworks systems.

XIV.

That the plaintiff, Boise City, on the 7th day of June, 1906, enacted and approved an ordinance of said City, No. 678, as follows, to wit:

An Ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation, organized and existing under the by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

Whereas, Boise City, is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, therefore, Boise City does ordain as follows:

SECTION 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300 required by Section 1 of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

SECTION 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor June 2d, 1906.

Passed over the Mayor's veto June 7th, 1906, by a vote of 8 Ayes; 3 Noes."

XV.

That the whole number of the members of the Common Council of the plaintiff, Boise City, on the 7th day of June, 1906, was twelve members and that said Ordinance No. 678, after the same was vetoed by the Mayor of the plaintiff on the 2d day of June, 1906, was thereafter on the 7th day of June, 1906, passed by the Common Council of said Boise City, over the veto of said Mayor, by a two-thirds vote cast by the Common Council of said Boise City.

XVI.

That the City Clerk of said Boise City duly notified the said defendant of the requirements of said Ordinance No. 678, and
74 from and after the enactment of said Ordinance No. 678, and until this action was begun, did on the first day of each and every month, demand of said defendant the payment of said monthly license of three hundred dollars, required by said Ordinance, but the said Defendant refused on the first day of each and every month after the enactment and approval of said Ordinance No. 678 until the beginning of this suit and still refuses and neglects to pay said monthly license, or any part thereof, to said Boise City.

XVII.

That on the 6th day of December, 1906, the plaintiff by its mayor and common council, passed and approved Ordinance No. 699, requiring and ordering the proper officers of said Boise City to institute an action for and on behalf of said Boise City in any court of competent jurisdiction, against the said defendant for the enforcement of the provisions of said Ordinance No. 678 and the collection from said defendant of the sum of money due said Boise City from said defendant under the provision of said Ordinance No. 678.

XVIII.

That all of the aforesaid ordinances are now, and ever since their said passage and approval, have been in full force and effect.

XIX.

That since the passage of said ordinance mentioned in Finding XIV, said plaintiff and its common council have claimed
75 that the ordinances set forth in the findings III and IV, were and are mere licenses which may be revoked or annulled at the will of said common council, and that said common council may compel this defendant to discontinue its business of supplying

water and of using said streets and alleys therefor or subject it to the payment of the license fee or any other burdens for such privilege.

XX.

That each and every year since this defendant and its grantors have been engaged in the business of supplying water, their waterworks and all property, both real and personal, owned by them in the Territory and State of Idaho, have been duly assessed for payment of all State and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof, as all other property in said Boise City, and this defendant and its predecessors in interest have each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against their property.

XXI.

That on the 11th day of May, 1905, two commissioners were appointed by the mayor and common council of the plaintiff, Boise City, and two commissioners were thereafter appointed by the defendant, for the purpose of fixing and determining the rates to be charged by the defendant for water for domestic, municipal and other purposes in said Boise City. That said commissioners met and adopted a schedule of rates to be charged by defendant
76 for all purposes mentioned in section 2711 of the Revised Statutes of Idaho, and the act approved March 9, 1905, amendatory thereof. That the rates so adopted were intended to yield to defendant a net return of six per cent per annum upon the then value of defendant's waterworks plant, and that such rates have not and will not yield to defendant a greater return. That the said rates so fixed by said commission were, after August 1, 1905, and still are charged by defendant for water and that defendant has, at all times, acquiesced in the rates so fixed and regulated its charges accordingly, and that said license tax levied by plaintiff was not considered or contemplated by said Commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission.

XXII.

That the Eastman Brothers and the Artesian Water and Land Improvement Company and the defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys and no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of Ordinance No. 678 set forth in Finding XIV.

XXIII.

That the amount in controversy in this action, exclusive of interest and costs, exceeds the sum or value of Two Thousand Dollars.

77 *Conclusions of Law.*

As conclusions of law the Court finds:

I.

That the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, a corporation, its successors or assigns, was granted in view of the limitation of fifty years, fixed upon its duration by section 2710 of the Revised Statutes of Idaho, and is not a mere license subject to recall at any time, and that this ordinance, having been accepted and acted upon by the grantee and its successors, creates a franchise for fifty years.

II.

That the imposition of the license tax set forth in Finding XIV is an impairment of such franchise and is, therefore, void.

III.

That the defendant is entitled to judgment with costs of suit.

Let judgment be entered in accordance herewith.
Dated April 20, 1910.

WM. B. GILBERT, *Judge.*

[Endorsed:] Filed April 22, 1910. A. L. Richardson, Clerk.

78 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Judgment.

This cause coming on regularly for hearing before the Court, a jury trial having been expressly waived by stipulation in writing filed herein, upon the pleadings, proofs taken and stipulations filed herein, F. B. Kinyon, Esq., and Messrs. Cavanah & Blake appearing as attorneys for the plaintiff, and Richard H. Johnson, Esq., appearing as attorney for the defendant, and the same having been argued and submitted to the Court for consideration and decision, and the Court after due deliberation, having filed its findings and decision in writing, and ordered that jugment be entered herein in accordance therewith;

Now, therefore, by virtue of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff take nothing

by this action, and that the defendant do have and recover of and from said plaintiff, its costs and disbursements herein, amounting to the sum of $22.20.

Judgment entered April 26, 1910.

79 UNITED STATES OF AMERICA,
District of Idaho, ss:

I, A. L. Richardson, do hereby certify that the above and foregoing is a true and correct copy of the Judgment in the above-entitled cause, entered in Judgment Book No. 1 of said court, at page 421.

Witness my hand and the seal of said court this 26th day of April, 1910.

A. L. RICHARDSON, *Clerk.*

[Endorsed:] Filed Apr. 26, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Bill of Exceptions.

Be it remembered that on the 12th day of January, 1910, this cause came on for trial in said court before the Honorable William B. Gilbert, the Judge presiding, F. B. Kinyon, Esq., and Cavanah & Blake, appearing as counsel for the plaintiff, and Johnson & Johnson, appearing as counsel for the defendant. A jury having been heretofore expressly waived by both parties the trial was had
80 before the Court, whereupon said parties filed their agreed stipulation of facts, which are as follows:

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Stipulation of Facts [First—in Bill of Exceptions].

It is hereby stipulated by and between the parties to the above-entitled action by their attorneys herein that the following shall constitute a statement of the facts agreed upon in said action to be

used on the final trial hereof before the Court, a jury being expressly waived herein.

1. The first, second, fourth, fifth, sixth, seventh, eighth, ninth and tenth allegations of plaintiff's amended complaint are admitted.

2. All of the third allegation of said complaint is admitted except that portion thereof on the fourth and fifth lines of said allegation, which states that said ordinance is "a license for an indefinite period."

3. That the first, seventh and eighth allegation of defendant's answer to said amended complaint are hereby admitted to be true.

4. That the sixth allegation of defendant's said answer, including Exhibit "A" therein referred to, is hereby admitted to be
81 true, but plaintiff does not admit that the ordinances referred to in said allegation were passed by the common council of plaintiff under authority of the general laws of Idaho.

5. That the ninth and tenth allegations of defendant's said answer are hereby admitted to be true, but plaintiff does not admit that the ordinances mentioned in said allegations and in the said sixth allegation are franchises or that defendant furnished such water under authority of or in accordance with the laws of Idaho, or that such laws apply to the furnishing of water in Boise City, but plaintiff admits that the defendant and its predecessors in interest, in furnishing such water, complied with all conditions and requirements contained in such laws, and plaintiff reserves its objection as to the admissibility of the facts set forth in the said ninth and tenth allegations on the ground that they are irrelevant, incompetent and immaterial and no defense to the action.

6. As to the eleventh allegation of said answer, plaintiff admits that after the passage of said ordinances purporting to give the rights to use the streets and alleys of said city, the predecessors of said defendant proceeded to lay their pipes and supply said water, and that defendant and its said predecessors in interest have ever since continued so to do by reason of the passage of said ordinances, and that since the passage of said ordinance mentioned in the sixth allegation of said complaint, said plaintiff and its common council have claimed that said ordinances were and are revocable licenses, as alleged in said eleventh allegation of said answer.

82 7. The twelfth allegation of said answer is hereby admitted to be true, but plaintiff reserves the objection that the facts therein stated are immaterial, irrelevant and incompetent and not a defense to the action.

8. As to the thirteenth allegation of said answer, plaintiff admits the appointment of the commissioners, and that they met and adopted a schedule of rates to be charged by defendant for all purposes mentioned in said allegation, and that said rates were intended to yield the net return of six per cent mentioned therein, and that they do not now and will not yield a greater return, and that the said rates so fixed by said commission were, after August 1, 1905, and still are, charged by defendant for water, and that defendant has at all times acquiesced in the rates so fixed, and regulated its charges accordingly, and that said license tax levied by plaintiff was

not considered or contemplated by said commission in fixing said rates, and that its enforcement will reduce defendant's net income to an amount considerably less than that fixed by said commission, as set forth in said thirteenth allegation of said answer, but plaintiff does not admit that the statutes referred to in said allegation have application to the appointment of commissioners in said Boise City, or that they could be legally appointed pursuant to said statutes.

9. That the fourteenth allegation of said answer is hereby admitted to be true and it is stipulated that the franchise to the Capital Water Company mentioned therein is, by its terms, limited to endure for a period of fifty years, and plaintiff reserves its legal
83 objection that said franchise was not granted under the laws of Idaho therein referred to, and that the facts stated in said thirteenth and fourteenth allegations are irrelevant, incompetent and immaterial and not a defense to the action.

10. It is admitted that the said Eastman Brothers and the said Artesian Water and Land Improvement Company and said defendant paid no pecuniary consideration for the grants made to them of the use of said streets and alleys, and that no pecuniary consideration therefor was ever demanded or required by said plaintiff therefor, prior to the passage of said ordinance No. 678, which is hereto attached, marked Exhibit 1, and admitted in evidence.

11. It is admitted that plaintiff has made due and proper demand upon defendant for the payment of the amount prayed for in said complaint and that defendant has paid no part thereof.

It is hereby stipulated by counsel in the above-entitled action that the defendant has furnished water to plaintiff as shown in the annexed statement, during the year 1909, and paid the defendant the amounts thereon stated.

That the city council of plaintiff in the month of December, 1909, by resolution directed defendant company to install fire hydrants for use by the city fire department on the defendant'- mains as follows: On the corner of North 17th and Sherman Streets; North 19th and Sherman Streets; North 17th and Brumback Streets; North 21st and Resseguie Streets; and West State and 19th Streets.
84 That the plaintiff reserves its objection to the admissibility of the above facts on the ground that they are irrelevant, immaterial and incumbent and not a defense to this action.

Amount Paid by City of Boise to the Boise Artesian Hot and Cold Water Company, from January 1st, 1908, to December 1, 1909.

Date paid.		Domestic use.	Flushing sewers.	Street sprinkling.	Heating.
1908.					
January	4th.....	45.55	348.30	880.80	
February	8	30.40	177.55		
March	7	23.05	176.40		
April	6	24.55	176.40		
June	6	45.15	307.45		
August	10	50.24	94.60		
Sept.	10	29.66	47.30		
Oct.	6	30.03	47.30		
Nov.	7	31.16	47.30	3,300.00	
Dec.	5	26.00	47.30	.....	500.00
1909.					
January	6	.....	.....	354.46	
March	8	69.80	140.82		
May	10	32.60	47.30		
June	9	36.60	47.30		
July	6	40.55	47.30		
August	18	49.75	47.30		
Oct.	4	67.50	94.60	2,000.00	
Nov.	7	57.00	47.30	.....	337.00
Dec.	4	38.25	47.30	1,763.84	
		$727.84	$1,989.12	$8,299.10	$837.50

85 **Summary.**

Cold water for domestic use	.....	$727.84
" " " sewer flushing	.....	1,989.12
" " " street sprinkling	.....	8,299.10
Hot " Heating City Hall	.....	837.50
Total	.....	$11,853.56

Filed Oct. 23rd, 1909.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Attorneys for Plaintiff.
JOHNSON & JOHNSON,
Attorneys for Defendant.

Ordinance No. 678.

By Councilman Davis.

An ordinance requiring the Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a monthly license of $300.00 for the use and occupancy of the streets and alleys of said city.

Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and

86 Whereas, The Boise Artesian Hot and Cold Water Company is a private corporation, organized, existing and operating under the laws of the State of West Virginia, and,

Whereas, said Boise City on the 3d day of October, 1899, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit, and,

Whereas, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

Now, therefore, Boise City does ordain as follows:

SECTION 1. That, The Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1899, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300.00 for the privilege granted by said ordinance of October 3, 1899, to lay and repair water-

87 pipes in the streets and alleys of said City through which water is being furnished to the inhabitants of said Boise City by said Company.

SECTION 2. That, Demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month, said monthly license of $300.00 required by Section 1 of this ordinance.

SECTION 3. That, The City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesion Hot and Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

SECTION 4. That, Nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other

term than that provided for in the aforesaid Ordinance of October 3, 1899.

SECTION 5. This Ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31 day of May, 1906.

Vetoed by the Mayor June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest:

EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 678, passed by the Common Council of Boise City, the 31st day of May,
88 1906, vetoed by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, and of record and on file in this office.

Given under my hand and the seal of Boise City this 26th day of July, 1906.

[SEAL.] EMILY L. SAVIDGE,
City Clerk.

Specifications of Error.

Plaintiff specifies the following as errors made by the Court, and will urge the same as grounds why the judgment should be reversed:

I.

That the evidence showed that the plaintiff was entitled to recover.

II.

That the evidence showed that the plaintiff was entitled to recover, in that it appeared from the evidence and particularly from the ordinance No. 94, set forth in paragraph three of plaintiff's amended complaint, and from Exhibit "A" attached to defendant's amended answer, which granted to the defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claims the right to the use of the streets and alleys of Boise City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide for the length of time such privilege was to be enjoyed.

III.

That the evidence showed that the plaintiff was entitled to recover from the defendant, for the reason that it appears from
89 said Ordinance No. 678, herein set forth, that the defendant is required to pay plaintiff a monthly license for the use and

occupancy of the streets and alleys of Boise City for the sale and delivery of water to the plaintiff and the inhabitants of Boise City through the water-pipes laid by the defendants in the streets and alleys of said Boise City.

IV.

That the judgment is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence that the only right which the defendant had was a mere license to use the streets and alleys of Boise City which was revocable at the will of said city.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Attorneys for the Plaintiff, Residing at Boise, Idaho.

The above and foregoing bill of exceptions is hereby presented for settlement by counsel for plaintiff, as their bill of exceptions in said cause.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Att'ys for Plaintiff, Residing at Boise, Idaho.

Service of copy of foregoing Bill of Exceptions is admitted this 4th day of May, 1910.

JOHNSON & JOHNSON,
Att'ys for Defendant.

[*Stipulation re Bill of Exceptions.*]

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the above-entitled cause,
90 that the foregoing may be allowed and settled as the bill of exceptions in said cause, and that the same may be settled and allowed by the Judge before whom said cause was tried, either in the State of California or the State of Oregon.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Att'ys for the Plaintiff.
JOHNSON & JOHNSON,
Att'ys for the Defendant.

[*Order Allowing, etc., Bill of Exceptions.*]

Now that the foregoing matters may be made a part of the record, the undersigned, Judge of the Circuit Court, of the Ninth Circuit, being the Judge before whom said cause was tried upon stipulation of the attorneys for the respective parties herein does hereby allow, settle and sign within the time allowed by law *and* foregoing bill of exceptions, and orders the same to be filed.

WM. B. GILBERT, *Judge.*

[Endorsed:] Filed May 13, 1910. A. L. Richardson, Clerk.

91 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by its attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court, for the Ninth Judicial District of the District of Idaho, Central Division, against said plaintiff on the 27th day of April, 1910, manifest error hath happened to the great damage of the said plaintiff.

Wherefore, plaintiff prays that a writ of error may issued in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case,
92 duly authenticated, be sent to the said Court of Appeals.

Dated May 27, 1910.

CAVANAH & BLAKE,
Attorneys for the Plaintiff, Residing at Boise, Idaho.

[Endorsed:] Filed May 28, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely in its prosecution of writ of error in the above-entitled cause:

I.

That the evidence showed that the plaintiff was entitled to recover.

II.

That the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence, and particularly from
93 Ordinance No. 94, set forth in paragraph 3 of plaintiff's amended complaint, as follows, to wit:

Ordinance No. 94.

An Ordinance Granting to Eastman Brothers the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, I. T., ordain:

SECTION 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipers in, through, along and across the streets and alleys of Boise City under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes or by water escaping therefrom.

SECTION 2. This ordinance shall take effect from and after its passage and approval.

Passed the Council this 3rd day of October, 1889.

Approved:

JAMES A. PINNEY, *Mayor.*

Attest:

[SEAL.] C. S. McCONNELL,
City Clerk.

And from Exhibit "A" attached to defendant's amended answer, which is as follows:

94 "EXHIBIT A."

An Ordinance Granting to the Artesian Water and Land Improvement Company the Right to Lay Water-pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, do ordain:

SECTION 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated to Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

SECTION 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

SECTION 3. This Ordinance shall take effect and be in force from and after its passage.

Approved July 10, 1890.

Which granted to defendant's predecessors in interest the privilege of laying down, repairing and maintaining water-pipes in the streets and alleys of Boise City, and under and by virtue of which defendant claimed the right to the use of the streets and alleys of Boise

City for the purpose of laying down, repairing and maintaining its water-pipes, do not provide the length of time such privilege can be enjoyed.

III.

That the evidence showed that the plaintiff was entitled
95 to recover from the defendant for the reason that it appears from Ordinance No. 678, which is as follows:

Ordinance #678.

By Councilman Davis.

An Ordinance Requiring the Boise Artesian Hot and Cold Water Company, a Private Corporation Organized and Existing under and by Virtue of the Laws of the State of West Virginia, to Pay to Boise City, a Municipal Corporation of the State of Idaho, on the First Day of Each and Every Month, a Monthly License of $300.00 for the Use and Occupancy of the Streets and Alleys of said City.

Whereas, Boise City is a municipal corporation, organized and existing under and by virtue of the laws of the State of Idaho; and,

Whereas, The Boise Artesian Hot and Cold Water Company, is a private corporation organized, existing and operating under the laws of the State of West Virginia; and,

Whereas, said Boise City on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city for profit; and,

96 Whereas, The said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks.

Now Therefore, Boise City Does Ordain as follows:

Section 1. That the Boise Artesian Hot and Cold Water Company, a private corporation organized under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman, in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300.00, for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said City through which water is being furnished to the inhabitants of said Boise City by said company.

Section 2. That demand is hereby made by said Boise City of and from the said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month said monthly license of $300.00 required by Section 1 of this Ordinance.

SECTION 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot and Cold Water Company, of the requirements of this ordinance to pay said license as aforesaid.

97 SECTION 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid ordinance of October 3, 1889.

SECTION 5. This ordinance shall take effect and go in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

Vetoed by the Mayor, June 2, 1906.

Passed over the Mayor's veto June 7, 1906, by a vote of 8 ayes; 3 noes.

Attest:

EMILY L. SAVIDGE,
City Clerk.

I, E. L. Savidge, City Clerk, hereby certify that the within and foregoing is a true copy of Ordinance No. 678 passed by the common council of Boise City, the 31st day of May, 1906, vetoed by the Mayor the 2d day of June, 1906, passed over the Mayor's veto June 7th, 1906, of record and on file in this office.

Given under my hand and the seal of Boise City, this 26th day of July, 1906.

[SEAL.]

EMILY L. SAVIDGE,
City Clerk.

Which ordinance was passed and approved on June 7th, 1906, and is still in force and effect and ever since has been in full force and effect in said Boise City, Idaho, that the defendant is required to pay the plaintiff a monthly license for the use and occupancy of the streets and alleys of said Boise City for the sale and delivery of water to the plaintiff and the inhabitants of said Boise

98 City through water-pipes laid by defendant in the streets and alleys of said Boise City.

IV.

The Court erred in rendering judgment for the defendant for the reason it appears from Ordinances No. 94 and Exhibit "A" above referred to, that defendant had but a mere license to the use of the streets and alleys of Boise City revocable at any time at the option of said City.

V.

That the judgment is not sustained by the pleadings.

VI.

That the trial court erred in entering a judgment in favor of the defendant and against the plaintiff.

VII.

That the Court erred in overruling plaintiff's demurrer to defendant's amended answer.

Wherefore, plaintiff and appellant prays that the judgment of said court be reversed.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Attorneys for the Plaintiff, Residence and Postoffice Address, Boise, Idaho.

[Endorsed:] Filed May 4, 1910. A. L. Richardson, Clerk.

99 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited (a Corp.), Defendant.

Stipulation [Waving Filing of Bond on Writ of Error].

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled cause that the filing of a bond on the writ of error herein is waived and no bond or undertaking need be filed.

Dated May 4th, 1910.

FRANK B. KINYON AND
CAVANAH & BLAKE,
Attorneys for Plaintiff.
RICHARD H. JOHNSON,
Attorney for Defendant.

[Endorsed]: Filed May 4, 1910. A. L. Richardson, Clerk.

100 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited (a Corporation), Defendant.

Order Allowing Writ of Error, etc.

It is hereby ordered that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein;

And it appearing that the parties in the above-entitled cause have filed a stipulation waiving bond on said writ of error. It is hereby ordered that no bond herein need be filed.

Dated this 2d day of June, 1910.

WM. B. GILBERT, *Judge.*

[Endorsed:] Filed June 4, 1910. A. L. Richardson, Clerk.

101 In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corp.), Defendant.

Præcipe for Transcript.

To A. L. Richardson, Clerk of the Above-entitled Court:

You are herebv notified that we have filed a petition for writ of error in the above-entitled cause to the Circuit Court of Appeals, Ninth Circuit, which petition has been granted by the Honorable William B. Gilbert, before whom said cause was tried, and we desire that you prepare a transcript of the proceedings in said cause, which transcript shall include all papers filed therein, together with all proceedings had in said cause, except the original complaint and summons filed and issued out of the District Court of the Third Judicial District of the State of Idaho in Ada County.

June 10th, 1910.

Very respectfully,

FRANK B. KINYON AND
CAVANAH & BLAKE,
Att'ys for the Plaintiff.

102 [Endorsed:] Filed June 10, 1910. A. L. Richardson, Clerk.

[*Writ of Error (Original).*]

The United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Ninth Judicial Circuit, ss:

The President of the United States to the Honorable Judge of the Circuit Court of the United States for the District of Idaho, Central Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, between Boise City, a municipal corporation, as plaintiff, and The

Boise Artesian Hot and Cold Water Company, Limited, a corporation, as defendant, a manifest error hath happened, to the great damage of the said Boise City, a municipal corporation, plaintiff, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, Cal., in said circuit, within thirty
103 days from the day of signing the citation, in said Circuit Court of Appeals, to be then — there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of June, in the year of our Lord, one thousand nine hundred and ten.

[SEAL.] A. L. RICHARDSON,
Clerk U. S. Circuit Court for the District of Idaho.

[Endorsed:] No. 310. Circuit Court of the United States, District of Idaho, Central Division. Boise City vs. Boise Artesian Hot and Cold Water Company, Ltd. Writ of Error. Filed June 4, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE CITY, a Municipal Corporation, Plaintiff,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant.

104 *Citation. [Original].*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Boise Artesian Hot and Cold Water Company, Limited, and Johnson & Johnson, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein Boise City, a municipal corporation is plaintiff and you are defendant in error, to show

cause, if any there be, why the judgment of the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of Supreme Court of the United States of America, this 4th day of June, 1910, and of the Independence of the United States the one hundred and thirty-fourth.

WM. B. GILBERT,
United States Circuit Judge Presiding in the Circuit Court for the District of Idaho, Central Division.

Attest:
[SEAL.] A. L. RICHARDSON, *Clerk.*

105 Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 10th day of June, 1910.

JOHNSON & JOHNSON,
Att'ys for Defendant in Error.

[Endorsed:] No. 310. Circuit Court of the United States, Dist. of Idaho, Central Division. Boise City vs. Boise Artesian Hot and Cold Water Co. Citation. Filed on return June 10, 1910. A. L. Richardson, Clerk.

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:
[SEAL.] A. L. RICHARDSON, *Clerk.*

[*Certificate of Clerk U. S. District Court to Record.*]

In the Circuit Court of the United States in and for the District of Idaho.

BOISE CITY, a Municipal Corporation, Plaintiff in Error,
vs.
THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation), Defendant in Error.

106 I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 107, inclusive, contain true and correct copies of the Amended Complaint, Petition for Removal, Bond on Removal, Order of Removal, Clerk's Certificate with Record, Stipulation, Answer to Amended Com-

plaint, Motion to Strike, Demurrer to Answer, Ordinance No. 699, Stipulation of Facts, Stipulation, Opinion filed July 29, 1909, Order, Opinion filed April 1, 1910, Findings of Fact and Conclusions of Law, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Error, Stipulation, Order Allowing Writ of Error, Præcipe for Transcript, Writ of Error, Citation, Return to Writ of Error and Clerk's Certificate to Transcript, in the above-entitled cause, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of $66.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said Court this 18th day of June 1910.

[SEAL.] A. L. RICHARDSON, *Clerk.*

107 [Endorsed:] No. 1875. United States Circuit Court of Appeals for the Ninth Circuit. Boise City (a Municipal Corporation of the State of Idaho), (Plaintiff), Plaintiff in Error, vs. The Boise Artesian Hot and Cold Water Company, Limited (a Corporation), (Defendant), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division. Filed June 30, 1910. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

108 United States Circuit Court of Appeals for the Ninth Circuit.

in Error,

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and seven (107) pages, numbered from and including one (1) to and including one hundred and seven (107) to be a full, true and correct copy of the Printed Transcript of Record upon writ of error to the United States Circuit Court for the District of Idaho, Central Division, in the above-entitled case, as the original thereof remains on file and of record in my office, the said copy having been printed under my supervision pursuant to the provisions of the twenty-third rule of the Rules of Practice of the said Circuit Court of Appeals.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this seventeenth day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

109 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED (a Corporation) (Defendant), Defendant in Error.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

(*Addenda.*)

110 At a Stated Term, to wit, the October Term, A D. 1910, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court Room, in the City and County of San Francisco, on Thursday, the Thirteenth Day of October, in the Year of our Lord One Thousand Nine Hundred and Ten.

Present:

Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.
Honorable Cornelius H. Hanford, District Judge.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation, Defendant in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. C. C. Cavanah, counsel for the plaintiff in error, and by Mr. Richard H. Johnson, counsel for the defendant in error, and submitted to the court for consideration and decision, with leave to counsel for the plaintiff in error to file a certified copy of the decision of the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Central Division, in Circuit Court case No. 278.

111 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Opinion U. S. Circuit Court of Appeals.

Before Ross and Morrow, Circuit Judges, and Hanford, District Judge.

The plaintiff in error was plaintiff in the court below where it brought the action to recover from the defendant certain license fees imposed by one of its ordinances, enacted in 1906. The facts of the case are undisputed. They show, among other things, that the plaintiff in error is a municipal corporation operating under a special charter granted by the Legislature of the Territory of Idaho during the year 1863, and subsequent amendments thereto; that on the 3d day of October, 1889, the city enacted an ordinance
112 entitled "An ordinance granting Eastman Brothers the right to lay water-pipes in Boise City," the only two sections of which ordinance are as follows:

"SECTION 1. H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks for the supplying of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water-pipes in, through, and along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes, or by water escaping therefrom.

"SECTION 2. This ordinance shall take effect from and after its passage and approval." Approved October 3d, 1889.

The Artesian Water and Land Improvement Company having become organized as a corporation under the laws of the State of Idaho for the purpose of supplying Boise City and its inhabitants with water for public and family use, the city, on the 10th day of July, 1890, enacted an ordinance entitled, "An ordinance granting to the Artesian Water and Land Improvement Company the right to lay water pipes in Boise City," the three sections of which are as follows:

"SECTION 1. The privileges of laying down and maintaining water pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated to Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

"SECTION 2. All water pipes placed in said streets and
113 alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled, and with all convenient speed.

"SECTION 3. This ordinance shall take effect and be in force from and after its passage." Approved July 10, 1890.

Immediately after the enactment of the ordinance in their favor Eastman Brothers proceeded to construct a system of water works, consisting of artesian wells and reservoirs, and laid mains and pipes under and along the streets and alleys of Boise City, and to supply the city and its inhabitants with pure mountain water, in accordance with that ordinance, expending in such construction over $20,000.00 to the time they sold their interest therein to an Idaho corporation called the Artesian Hot and Cold Water Company, Limited, hereinafter mentioned.

Immediately after the enactment of the ordinance in favor of the Artesian Water and Land Improvement Company, it proceeded to sink Artesian wells, construct reservoirs, and lay pipes under and along the streets of the city, and to supply the city and its inhabitants with pure, fresh water for municipal, domestic and irrigation purposes, under and pursuant to the aforesaid ordinance in its favor, expending in the construction, extension, and improvement of its water works more than $50,000.00 up to the time of its sale thereof to the aforesaid Artesian Hot and Cold Water Company, Limited, as hereinafter mentioned.

The Artesian Hot and Cold Water Company, Limited, was organized under the laws of the State of Idaho, and was authorized by its articles of incorporation to supply the plaintiff in error and
114 its inhabitants with water for municipal and domestic uses, and to purchase and acquire the waterworks, wells, reservoirs, pipe-lines, properties, rights and franchises of both the Eastman Brothers, and the Artesian Water and Land Improvement Company, which purchase was effected on the 28th day of March, 1891.

The defendant in error is a corporation organized and existing under the laws of the state of West Virginia, with its principal place of business at Boise City, Ada County, Idaho. Its articles of incorporation authorize it to carry on "a waterworks system, and to sell and rent water to the inhabitants of the said Boise City and to take, purchase, acquire, hold, operate, and maintain rights and privileges of water companies, associations, or corporations, and to acquire, use, own, and operate all properties, franchises rights, claims, privileges, and everything belonging to that certain corporation known as the Artesian Hot and Cold Water Company, Limited, and to be the successor in every respect of said corporation."

On the 28th day of August, 1901, the defendant in error acquired by purchase from the Artesian Hot and Cold Water Company, Lim-

ited, all of its rights in and to both of the water systems mentioned, and all of its said waters, as well as all of the rights and privileges granted by the aforesaid ordinances.

The record further shows that between the 28th day of March, 1891, and the 28th day of August, 1901, the Artesian Hot and Cold Water Company, Limited, supplied the city and its inhabitants with pure, fresh water for municipal, domestic, and other useful
115 purposes, and that during that period the population of the city increased from about 3,000 to about 6,000 people, the area of the city being enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during which period the Artesian Hot and Cold Water Company, with the city's knowledge and consent extended its pipe-lines under the streets and alleys of the city from time to time, and supplied such additions with water to meet the demands upon it, and laid about 15 miles of additional pipe, constructed two wells and one reservoir for cold water, and erected a large steam pumping plant with a capacity of three million gallons a day, aggregating in cost more than $192,000.00. That at all times since the 28th day of August, 1901, the defendant in error has supplied the city and its inhabitants "by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence and consent, pure fresh water for municipal, domestic and other purposes, in accordance with said ordinances, and in full compliance therewith, and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about 6,000 to over 25,000 inhabitants, and this defendant, with plaintiff's knowledge, acquiescence and consent has extended its cold water system to meet the growth of said city, and has laid over thirty miles of additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water
116 supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day and has expended in the improvement and extension of said cold water system an additional sum of more than $140,000.00. That the defendant and its predecessors in interest in and to its waterworks system are now and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water pipes connected with said waterworks systems."

On the 7th day of June, 1906, the plaintiff in error enacted an ordinance, the first and fourth sections of which are as follows:

"SECTION 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated under said license granted by said ordinance of October 3d, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each

and every month, a monthly license fee of $300.00, for the privilege granted by said ordinance of October 3d, 1889, to lay and repair water pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company. * * *

"SECTION 4. That nothing in this ordinance shall be con-
117 strued or understood as granting any privilege or authority for any other term than that provided for in the aforesaid ordinance of October 3d, 1889."

The action was brought to recover the aggregate amount of three years' license fees so imposed, and which the defendant refused to pay after demand made.

The court below held that the ordinance of July 10, 1890, to the Artesian Water and Land Improvement Company, its successors and assigns, having been accepted and acted upon by the grantee and its successors, created a franchise for fifty years, and that the imposition of the license tax provided for by the ordinance of June 7th, 1906, was an impairment of such franchise and therefore void. Judgment followed accordingly, and the city brought this suit of error.

Ross, *Circuit Judge*, after stating the case as above, delivered the opinion of the court:

It will be seen from the foregoing statement that the trial court held in effect that the ordinance of July 10, 1890, granted to the Artesian Water and Land Improvement Company, one of the predecessors in interest of the defendant in error, a franchise to use the streets and alleys of the city for the purpose of supplying it and its inhabitants with water for the period of fifty years. If that be so, then manifestly the attempted imposition by the ordinance of June 7th, 1906, of the license fees in question was of no effect.
118 The court below held that the fact that the plaintiff in error was incorporated and exists under a special charter does not render inapplicable to it the provisions of Section 2710 of the Revised Statutes of Idaho of 1887, and that the provisions of that section should be read into the ordinance of July 10th, 1890, as a part thereof, and thereby fixed the life of the franchise or privilege granted by that ordinance at fifty years.

Section 2710 of the statutes so referred to reads as follows:

"No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

We are unable to give to this statute the effect attributed to it by the court below. Its terms and purposes, we think, seem quite plain. Every corporation formed to supply any city or town of the state with water is thereby prohibited from doing so unless previously

authorized by an ordinance of the authorities thereof, or unless done in conformity with a contract entered into between such city or town and the corporation. Such contracts are authorized by the statute, subject to the express provision that they shall not take from
119 the city or town the right to regulate the rates for water, nor, further expressly declares the statute, shall any exclusive right be granted, nor shall any such contract or grant be made for a term exceeding fifty years.

This is very far from saying that no such contract or grant shall be made for a shorter period than fifty years. It fixes a maximum beyond which no contract or grant is permitted to extend, but leaves the matter of time, within that limit, to be fixed by contract or by grant of the municipality.

In the case of Water Company v. Knoxville, 200 U. S., 22, 33, the Supreme Court said:

"'Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this court in Turnpike Co. v. Illinois, 96 U. S. 63, 68. The universal rule in doubtful cases—this court said in Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1, 26—is that 'the construction shall be against the grantee and in favor of the Government.' As late as Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562, this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been
120 said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Slidel v. Grandjean, 111 U. S. 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases. It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

Turning to the ordinance of July 10, 1890, it is seen that it only granted to the Artesian Water and Land Improvement Company, one of the predecessors in interest of the defendant in error, the privilege of laying down and maintaining water pipes in the streets and alleys then laid out in Boise City or thereafter to be laid out and dedicated, with provisions for the proper performance of the

work with reasonable diligence. In effect the provisions of that ordinance were precisely similar to those of the previous ordinance of October 3rd, 1889, granting to the Eastman Brothers, also predecessors in interest of the defendant in error, similar rights,
121 which were held by this court in the case of Boise City Artesian Hot and Cold Water Company v. Boise City, 123 Fed. 232, to have conferred on the Eastmans a license merely, revocable at the pleasure of the city—we there saying:

"The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. In the Constitutions of nearly all the states it is provided that no exclusive or perpetual franchises shall be granted, and, irrespective of such constitutional limitation, it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. The city of Boise was incorporated by the territorial legislature of Idaho on January 11, 1866. It was given power 'to provide the city with good and wholesome water,' and to erect or construct 'such waterworks and reservoirs within the established limits of the city as may be necessary or convenient therefor.' There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to
122 a corporation, for the purpose of furnishing a water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the Legislature. Cooley's Constitutional Limitations (2d Ed.) 205, 210; Dillon on Municipal Corporations, Secs. 715, 716; Barnett v. Denison, 145 U. S. 135, 139, 12 Sup. Ct. 819, 36 L. Ed. 652. And legislative grants of powers to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof. Charles River Bridge Co. v. Warren Bridge, 11 Pet. 426, 9 L. Ed. 773, 938; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 17 Sup. Ct. 718, 41 L. Ed. 1165; Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622. From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privi-

lege granted, or to put in its own waterworks, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water, and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

123 If a revocable license only, it does not seem to be questioned that the city might either terminate the license, or impose a license fee as a condition of its continued enjoyment.

It results from what has been said that the judgment must be and is reversed, with directions for further proceedings in accordance with the views here expressed.

Endorsed: Opinion Filed, Feb. 6, 1911, F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

124 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Defendant in Error.

In Error to the Circuit Court of the United States for the District of Idaho, Central Division.

Judgment U. S. Circuit Court of Appeals.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Idaho, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs in favor of the plaintiff in error and against the defendant in error, and that this cause be, and hereby is remanded to the said Circuit Court with directions for further proceedings in accordance with the views expressed in the opinion of this Court.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defendant in error for its costs herein expended, and have execution therefor.

(Endorsed:) Judgment. Filed and entered Feb. 6, 1911, F. D. Monckton, Clerk.

125 At a stated term, to-wit: the October term A. D. 1910 of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Court Room, in the City and County of San Francisco, on Thursday, the second day of March, in the year of our Lord one thousand, nine hundred and eleven.

Present:

Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Defendant in Error.

Order Staying Issuance of a Mandate Under Rule 32.

Upon motion of Messrs. Johnson & Johnson, counsel for the defendant in error, it is Ordered that the issuance of a Mandate under rule 32 in the above-entitled cause be, and hereby is stayed sixty (60) days from and after the 8th instant.

126 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Defendant in Error.

Petition for Writ of Error and Order Granting Petition.

Your petitioner, The Boise Artesian Hot and Cold Water Company, Limited, a corporation, defendant in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment has therein been rendered on the sixth day of February, 1911, reversing a judgment of the Circuit Court of the United States for the District of Idaho, Central Division, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs and that the jurisdiction of none of the courts above mentioned was dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; and that this cause does not

arise under the patent laws, nor the revenue laws, nor the
127 criminal laws, and that it is not an admiralty case; and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed to it in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said defendant in error may be reviewed, and if errors be found, corrected according to the laws and customs of the United States

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,
By RICHARD H. JOHNSON, *Its Attorney.*

The foregoing petition is granted, and the writ of error allowed as prayed for, upon defendant in error giving bond according to law in the sum of $18,000.; such bond when approved to act as a supersedeas.

(Signed) WM. W. MORROW,
United States Circuit Judge for the Ninth Judicial Circuit.

May 4, 1911.

(Endorsed:) Petition for Writ or Error and Order Granting Petition. Filed May 4, 1911, F. D. Monckton, Clerk.

128 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Defendant in Error.

Assignment of Errors.

And now comes the defendant in error, The Boise Artesian Hot and Cold Water Company, Limited, by Richard H. Johnson, its attorney and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and in the rendition of the final judgment therein manifest error has intervened to the prejudice of said defendant in error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment reversing the judgment of the Circuit Court of the United States for the Central Division of the District of Idaho in favor of defendant in error and against plaintiff in error.

Second. Said Circuit Court of Appeals erred in not affirming the said judgment of the United States Circuit Court aforesaid.

129 Third. Said Circuit Court of Appeals erred in holding that the ordinance of said plaintiff in error, numbered 678, passed over the Mayor's veto June 7, 1906, was valid and not repugnant to the constitution of the United States, the validity thereof having been drawn in question by defendant in error on the ground of its being in contravention of the constitution of the United States.

Fourth. Said Circuit Court of Appeals erred in not holding that the ordinance, aforesaid, No. 678, impaired the obligation of contracts existing between plaintiff in error and defendant in error, contrary to the provisions of Article 1, Section 10 of the Constitution of the United States, and is therefore invalid.

Fifth. Said Circuit Court of Appeals erred in not holding that the ordinance aforesaid, No. 678, operates to deprive defendant in error of its property without due process of law, contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and is therefore invalid.

Sixth. Said Circuit Court of Appeals erred in not holding that said ordinance No. 678, denies to defendant in error the equal protection of the laws contrary to the provisions of said fourteenth amendment, and is therefore void.

Seventh. Said Circuit Court of Appeals erred in holding and deciding that the ordinances and grants under which defend-

130 ant in error is using plaintiff's streets and alleys are only revocable licenses, and are subject to forfeiture and annullment at the will of the plaintiff's city council.

Eighth. Said Circuit Court of Appeals erred in rendering judgment against defendant in error in favor of plaintiff in error for costs of suit in said Circuit Court of Appeals.

Wherefore, the said Boise Artesian Hot and Cold Water Company, Limited, defendant in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the defendant in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said judgment of said Circuit Court of the United States for the Central Division of the District of Idaho be affirmed or such further proceedings had in said cause as may be determined by this Honorable Court, to the end that justice may be done in the premises.

RICHARD H. JOHNSON,
Attorney for Defendant in Error.

(Endorsed:) Assignment of Errors. Filed May 4, 1911, F. D. Monckton, Clerk.

131 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, that we, the Boise Artesian Hot and Cold Water Company, Limited, a corporation, as principal and Timothy Regan and Hosea B. Eastman, as sureties, are held and firmly bound unto Boise City, a municipal corporation of the State of Idaho, in the sum of Eighteen Thousand Dollars ($18,000) to be paid to the said city, to which payment well and truly to be made. we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of May, 1911.

Whereas, lately at a Circuit Court of Appeals for the
132 Ninth Circuit, in a suit depending in said court between said plaintiff in error and said defendant in error, a judgment was rendered against the said Boise Artesian Hot and Cold Water Company, Limited, defendant in error, and the said Boise Artesian Hot and Cold Water Company, Limited, seeks to prosecute its writ of error to the United States Supreme Court to reverse the said judgment rendered in the above-entitled action by the United States Circuit Court of Appeals for the Nninth Circuit;

Now, therefore, the condition of this obligation is such that if the said Boise Artesian Hot and Cold Water Company, Limited, shall prosecute its said writ of error to effect, and answer all damages and costs that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[SEAL.] By C. W. MOORE, *Its President.*

Attest: B. S. HOWE, *Secretary.*

TIMOTHY REGAN. [SEAL.]
HOSEA B. EASTMAN. [SEAL.]

133 STATE OF IDAHO,
County of Ada, ss:

Timothy Regan and Hosea B. Eastman, being first duly sworn, each for himself and not one for the other, on oath, deposes and says: We are each of lawful age and are citizens of the State of Idaho and free-holders in the said County of Ada, and we know the con-

tents of the foregoing instrument to which we have attached our names. We are each worth the sum specified in said bond as the penalty thereof, over and above all our debts and liabilities, exclusive of all property exempt from execution.

TIMOTHY REGAN.
HOSEA B. EASTMAN.

Subscribed and sworn to before me this 4th day of May, 1911.

RICHARD H. JOHNSON,
Notary Public.

[SEAL.]

My commission expires Dec. 29, 1912.

Bond approved, and to operate as a supersedeas.

(Signed) WM. W. MORROW,
U. S. Circuit Judge in and for the Ninth Circuit.

(Endorsed:) Bond on Writ of Error. Filed May 8, 1911, F. D. Monckton, Clerk.

134 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1875.

BOISE CITY, a Municipal Corporation of the State of Idaho, Plaintiff in Error,

vs.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Transcript of Record upon Return to Writ of Error.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-six (26) pages, numbered from and including one (1) to and including twenty-six (26), to be a true copy of the Assignment of Errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the Opinion filed therein, as the same remain on file and of record in my office, and that the same in connection with the preceding certified copy of the printed Transcript of Record constitute a true copy of the complete record in the above-entitled case and the Transcript of Record upon return to the annexed writ of error therein from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this seventeenth day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

135 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Boise Artesian Hot & Cold Water Company, Limited, defendant, and plaintiff if error, and Boise City, plaintiff, and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 8th day of May, in the year of
136 our Lord, one thousand nine hundred and eleven.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by

WM. W. MORROW,
United States Circuit Judge for the Ninth Circuit.

I hereby certify that a copy of the within writ of error was on the 8th day of May, 1911, lodged in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, for the said defendant in error, Boise City.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of a copy of the foregoing writ is hereby acknowledged this 12th day of May, 1911.

P. E. CAVANEY,
CAVANAH & BLAKE,
Attorneys for Defendant in Error.

137 *Return to Writ of Error.*

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are cammanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the eighth day of May, A. D. 1911, duly lodged in the cause in this Court for the within named defendant in error.

By the Court.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed:] No. 1875. United States Circuit Court of Appeals for the Ninth Circuit. Boise City, a Municipal Corporation of the State of Idaho, Plaintiff in Error, vs. The Boise Artesian Hot and Cold Water Company, Limited, a Corporation. Writ of Error. Filed May 15 1911. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

138 United States Circuit Court of Appeals for the Ninth Circuit.

THE BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED, a Corporation (Defendant), Plaintiff in Error,

vs.

BOISE CITY, a Municipal Corporation of the State of Idaho (Plaintiff), Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, ss.

The President of the United States to Boise City, a Municipal Corporation of the State of Idaho, and Cavanah & Blake and P. E. Cavaney, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington,

within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The Boise Artesian Hot & Cold Water Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William W. Morrow, United States
139 Circuit Judge for the Ninth Judicial Circuit, the 8th day of May, in the year of our Lord, one thousand nine hundred and eleven.

WM. W. MORROW,
United States Circuit Judge for the Ninth Circuit.

Attest:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Copy of foregoing citation served this 12th day of May, 1911.

P. E. CAVANEY,
CAVANAH & BLAKE,
Attorneys for Defendant in Error.

140 [Endorsed:] No. 1875. United States Circuit Court of Appeals for the Ninth Circuit. The Boise Artesian Hot & Cold Water Company, Limited, a corporation (Defendant), Plaintiff in Error, vs. Boise City, a Municipal Corporation of the State of Idaho (Plaintiff), Defendant in Error. Citation. Filed May 15 1911. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Endorsed on cover: File No. 22,720. U. S. Circuit Court Appeals, 9th Circuit. Term No. 313. The Boise Artesian Hot & Cold Water Company, Limited, plaintiff in error, vs. Boise City. Filed June 6th, 1911. File No. 22,720.

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Supreme Court of the United States

OCTOBER TERM, 1912

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plaintiff in Error.
vs.
BOISE CITY. — No. 313

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plaintiff in Error.
vs.
BOISE CITY. — No. 573

and

BOISE CITY, Plaintiff in Error,
vs.
THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited. — No. 639

Brief on Behalf of Plaintiff in Error in Nos. 313 and 573 and Defendant in Error in No. 639.

STATEMENT.

These cases, involving the same question, were consolidated for the purposes of argument, submission and decision.

Cases No. 313 and 573, in which the Water Company is the plaintiff in error, involve but one question, and that is whether or not certain ordinances of the City of Boise amount to an impairment of the street franchises of the Water Company in violation of the contract clause of the Federal Constitution.

No. 639 is a cross-writ of error by Boise City in No. 573 and involves additional questions.

Both cases were pending at the same time in the United States Circuit Court for the District of Idaho. Judge Gilbert, United States Circuit Judge, who tried No. 313 in the Circuit Court, decided that the ordinance in question was an impairment of the Water Company's rights and therefore void. The jurisdiction of the Circuit Court having been invoked, both upon the ground of diverse citizenship as well as upon the constitutional question, the city took the case by writ of error to the Circuit Court of Appeals instead of directly to this Court.

Judge Dietrich, District Judge, who tried No. 573, reached the opposite conclusion and sustained the ordinance, and the Water Company removed the case by writ of error directly to this Court. No. 313 was tried first, and the Circuit Court of Appeals reversed the judgment of Judge Gilbert, and the Water Company removed the case by writ of error to this Court, under Section 6 of the Act of March 3, 1891, so that the constitutional question involved in both cases might be finally decided by this Court at the same time.

The facts in each case need not be separately stated, except where it is necessary to fully explain the issues raised.

No. 313 was an action brought by Boise City against the Water Company to collect $10,130 claimed to be due under ordinance No. 678 of Boise City (Record, p. 24) for the privilege, which the Water Company and its predecessors had enjoyed for many years, of occupying the streets and alleys of Boise City with their mains and pipes in supplying water to the City and its inhabitants. It was tried on demurrer to defendant's answer and upon an agreed statement of facts.

On pages 26-42 of the Record is found the opinion of Judge Gilbert holding that ordinance No. 678 amounted to an impairment of the street franchise rights of the Water Company, in violation of the contract clause of the Federal Constitution and was therefore void. Judgment was acordingly entered in the Circuit Court in favor of the Water Company.

The opinion of the Circuit Court of Appeals on writ of error, which was sued out by the City, is found on pages 60-66 of the Record. That Court reversed the judgment of Judge Gilbert and held that the ordinance in question did not amount to an impairment of the contract rights of the Water Company, for the reason that the Water Company had only revocable licenses to use the streets of the City with its mains and pipes by reason of the fact that no definite term was fixed in the grants under which the Water Company operated.

Case No. 573 involves the constitutionality of the same ordinance, and came to this Court upon writ of error directly to the District Court of the United States for the District of Idaho. This suit was originally commenced by the Water Company in the Circuit Court of the United

States for the District of Idaho about the same time that the amended complaint, hereafter referred to, was filed by the City in case No. 313. It was instituted to collect from the City the amount claimed to be due for use by the City for water for fire purposes in accordance with rates established by a commission appointed to fix rates under a statute of the State of Idaho, which is hereafter set forth in full. The City set up as defenses to the suit, that the Water Company had not complied with the conditions fixed by the commission in that it had not furnished adequate pressure for fire protection, and that the complaint set forth no ordinance or contract under which the company was authorized to furnish water to the city, and that the commissioners in fixing the rates acted without authority, and that their findings and report were not binding upon the City. These defenses were set up in an answer. When the case was set for trial the City filed a motion to interpose as a counter-claim the amount claimed to be due from the Water Company to the City for the monthly license tax for the use of the streets under ordinance No. 678 above referred to, and which had accrued subsequently to the amount sued for in suit No. 313. A stipulation of facts signed by both sides was then filed, which set up all of the ordinances under which the Water Company claimed its franchise rights and all other facts necessary to fully present the question of the constitutionality of ordinance No. 678. This stipulation is found in the bill of exceptions of the Water Company on pages 19 to 29 of the Record of No. 573. At the hearing on this motion the Water Company interposed certain objections, the one principally relied upon being that ordinance No. 678, upon which the counter-claim was based, was an impairment of

the street franchise rights of the Water Company and was therefore in violation of the Federal Constitution and void. These objections were overruled by the Court and an exception allowed and the City was permitted to interpose the counter-claim.

The case was afterward tried before a jury and at the conclusion of the evidence the attorneys for the City requested the Court to allow the counter-claim and to instruct the jury to find for the City the amount claimed. This was objected to by the Water Company upon the same grounds as the previous objection, which objections were overruled by the Court and an exception taken and allowed. (Record p. 29-30). At the conclusion of the trial, the Court, among its instructions, gave one to the jury to allow the counter-claim in full, which instruction is hereafter set forth in full in the specifications of errors. Before the jury retired, counsel for the Water Company duly excepted to this charge on the grounds above mentioned, the one principally urged being that the counter-claim mentioned in said charge was based upon ordinance No. 678 and that said ordinance was in violation of Section 10, Article I, of the Constitution of the United States, in that it was an impairment of the contracts existing between plaintiff and defendant, arising out of the franchises held and owned by plaintiff for the use of defendant's streets in the supplying of water to defendant and its inhabitants. (Record p. 31).

Counsel for both sides then stipulated that the total amount claimed to be due to the Water Company upon the cause of action set forth in its complaint was $11,833.35.

The jury then retired, and after a short absence returned into court with a verdict in favor of plaintiff for the sum of $10,049.95 which was the total amount, including interest, claimed by the company for fire services between May 1, 1906 and May 1, 1909, after deducting the sum of $1,783.40, the full amount of the counterclaim embraced in defendant's amendment to its answer. This verdict was rendered February 22, 1912, and judgment in accordance therewith was duly entered. (Record p. 31).

A bill of exceptions on behalf of the Water Company was duly settled and allowed by the Court, covering the objections to permitting the counter-claim to be filed as an amendment to the answer, the allowance thereof by the Court and the charge to the jury relating thereto. This writ of error was then sued out by the Water Company directly from this Court to the District Court to review the matters contained in the bill of exceptions relating to the constitutionality of ordinance No. 678.

The City sued out a cross-writ of error from this Court to review certain matters relating to rulings by the Court on the introduction of testimony and certain instructions of the Court to the jury, which are found in the bill of exceptions of the City.

The Water Company originally attacked the constitutionality of ordinance No. 678, and also sought to recover the amount due from the City for fire services now involved in case No. 573, in an equity suit brought in the Circuit Court of the United States for the District of Idaho. That Court sustained the validity of ordinance No. 678 on the ground that the rights of the Water Company to the use of the streets were revocable licenses

only. An appeal from the judgment was taken to this Court and the decision is reported in 213 United States, 276, 278. The present action at law, No. 313, was then pending in a State court in Idaho, but the Water Company, who was the defendant in the action, had not yet appeared therein, and a stipulation had been filed that the action might be held in abeyance until the determination of the equity suit, in which it was thought that the nature of the Water Company's rights to the use of the streets and the validity of ordinance No. 678 would be finally determined by this Court. This Court, in an opinion written by Mr. Justice Moody, held that the court below as a court of equity had no jurisdiction of the suit, for the reason that the Water Company had an adequate remedy at law in the action then pending in the State court, which is case No. 313 now before this Court, and refused to pass upon the question until it should come up here in this action. The Court said, on page 287, that presumably the Water Company might have removed this case from the State court to the Circuit Court of the United States on the ground of diverse citizenship if the attempt had been seasonably made. It appeared, however, in the record in that suit and in the argument for appellee on page 278 of 213 United States, that the amount sued for by the City at that time was only $1,730.00. This Court held, however, that if the present suit was either tried out in the State court or removed to the Federal court the constitutionality of the ordinance would be passed upon by this Court. Afterwards, and before appearance on the part of the defendant, and after the decision of this Court in the equity suit, the City, by leave of Court, filed an amended complaint in this action and claimed $10,130

due as license fees under ordinance No. 678. The Water Company raised the single issue of the constitutionality of ordinance No. 678 under the Federal Constitution, and at the same time removed the case to the United States Circuit Court.

The plaintiff in error, which, on account of the cross-writ of error, we will for convenience refer to as the "Water Company," claims rights of way and franchises for the purpose of laying and maintaining its pipes under and along the streets and alleys of Boise City for the supplying of water to the City and its inhabitants by virtue of the provisions of Section 2840 of the Revised Codes of Idaho, and also as the successor of Eastman Brothers and the Artesian Water & Land Improvement Company under certain ordinances of Boise City.

Section 2840 of the Revised Codes of Idaho, being part of Chapter V, Title IV, of the Civil Code relating to Water and Canal Corporations (Rev. Stat. 1887, Sec. 2712) is as follows:

> "Any corporation created under the provisions of this title for the purposes named in this chapter, subject to the reasonable rules and directions of the city or town authorities as to the mode or manner of using such right of way within the city or town, and subject to the reasonable rules and directions of the board of county commissioners as to the mode and manner of using any right of way outside of the corporate limits of such city or town, may use so much of the streets, alleys and ways in any city or town, or the public roads and highways within the county, as may be necessary for the laying of pipes for conducting water to its consumers, or the building and maintaining of ditches, canals, pipes, flumes and acqueducts in conducting water from outside points to the corporate limits of said city or town."

On October 3, 1889, the City Council of Boise City, under authority contained in its charter, passed the following ordinance, which was approved by the Mayor:

"An Ordinance Granting Eastman Brothers the Right to Lay Water Pipes in Boise City.

"The Mayor and Common Council of Boise City ordain:

"Section 1. H. B. Eastman and B. M. Eastman, and their successors in interest in their water works for the supply of mountain water to the residents of Boise City are hereby authorized to lay and repair their water pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

"Section 2. This ordinance shall take effect from and after its passage and approval.

"Passed the Council this 3rd day of October, 1889.

"Approved: James A. Pinney, Mayor.

"Attest: C. S. McConnell, City Clerk."

"(Seal). Record No. 313, pp. 2, 36; No. 573, pp. 15, 19.)"

July 10, 1890, the Common Council of Boise City, under authority contained in its charter, and in accordance with the provisions of Section 2840, quoted above, passed the following ordinance, which was approved by the Mayor:

"An Ordinance Granting to the Artesian Water & Land Improvement Company the Right to Lay Water Pipes in Boise City.

"The Mayor and Common Council of Boise City, Idaho, do ordain:

"Section 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out, or hereafter to be laid out and dedicated in

Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

"Section 2. All water-pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

"Section 3. This ordinance shall take effect and be in force from and after its passage.

"Approved July 10, 1890."

(Record No. 313, p. 18, 36; No. 573, p. 20).

It is admitted by the stipulations in both cases that after the approval of the ordinance to Eastman Brothers they accepted the same and immediately proceeded thereunder and with due diligence to construct a water works plant or system consisting of artesian wells and reservoirs; that they laid mains and pipes under and along plaintiff's streets and alleys and supplied plaintiff and its inhabitants with pure mountain water in accordance with said ordinance. (Record No. 313, p. 13; No. 573, p. 20).

It is also admitted that the Artesian Water & Land Improvement Company was incorporated under said Chapter 5, Title 4, of the Civil Code of Idaho, relating to Water and Canal Corporations, for the purpose of supplying Boise City and its inhabitants with water for public and family uses, and after the pasage and approval of the ordinance above mentioned, that Company accepted the same and immediately proceeded thereunder and with due diligence to sink artesian wells, construct reservoirs and lay pipes under and along plaintiff's streets and alleys and to supply plaintiff and its inhabitants with pure, fresh water for municipal, domestic and irrigation purposes. (Record No. 313, p. 13; No. 573, p. 20).

It is also admitted that on March 28, 1891, the Eastman Brothers and the Artesian Water & Land Improvement Company sold their respective water plants and systems and all rights under said ordinances and statute to the Artesian Hot & Cold Water Company, Limited. (Record No. 313, p. 14, 22; No. 573, p. 22).

The latter company went into possesion of both systems and of all the property of every nature belonging thereto, and of the rights, privileges and franchises granted by the statute and the ordinances aforesaid, and operated the system continuously until August, 1901, and during that time supplied the plaintiff and its inhabitants under those ordinances and statutes, and with the acquiescence and consent of the City, with pure, fresh water for municipal, domestic and other useful purposes.

It is further admitted that the present Water Company was incorporated on the first day of September, 1900, and was chartered to exist as a corporation for a period of fifty years, or to and until the first day of Septemper, A. D. 1950; and was expressly authorized and empowered by its charter to take, purchase, acquire, operate, hold and maintain the rights and properties of water companies and associations, or corporations, and to acquire, use, own and operate all properties, franchise rights, claims, privileges and everything belonging to that certain corporation known as the Artesian Hot & Cold Water Company, Limited, and to be successor in every respect of the said corporation. (Record No. 313 p. 11-12).

The agreed statement of facts in both cases also shows that on the 28th of August, 1901, the present Water Company succeeded by purchase to the entire water works

system and plant of the Artesian Hot & Cold Water Company, Limited, including all of its property of every kind and nature, and all of the rights, privileges and franchises which had been granted to it and to its predecessors in interest by the statutes of the State of Idaho, or by the ordinances hereinbefore referred to. That at all times since said 28th day of August, 1901, the present company has supplied to the city and its inhabitants, by virtue of said laws and ordinances and with the acquiescence and consent of the City, pure, fresh water for municipal, domestic and other useful purposes. (Record No. 313 p. 14.)

That at the time of the institution of this action the present company and its predecessors in interest had, with the acquiescence and consent of the City, expended more than $400,000 in the improvement and extension of the water works system. It is also admitted that the present company and its predecessors in interest have always furnished pure and wholesome water and charged the rates fixed by the commission under the statutes hereinafter referred to.

That on the 7th day of June, 1906, the Common Council of Boise City passed the following ordinance over the veto of the Mayor:

"Ordinance No. 678.

"An Ordinance requiring the Boise Artesian Hot & Cold Water Company, a private corporation, organized and existing under and by virtue of the laws of the State of West Virginia, to pay to Boise City, a municipal corporation of the State of Idaho, on the first day of each and every month, a month-

ly license of $300 for the use and occupancy of the streets and alleys of said Boise City, Idaho, in furnishing water to the residents of said city.

"Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho, and,

"Whereas, The Boise Artesian Hot and Cold Water Company is a private corporation organized, existing and operating under the laws of the State of West Virginia, and

"Whereas, said Boise City, on the 3d day of October, 1889, approved an ordinance granting to H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, a license for an indefinite period to lay and repair water-pipes in the streets and alleys of said Boise City through which water is being furnished by said company to the residents of said city, for profit, and

"Whereas, the said Boise Artesian Hot and Cold Water Company are the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks.

"Now, therefore, Boise City does ordain as follows:

"Section 1. That the said Boise Artesian Hot and Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated and said license granted by said ordinance of October 3, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month a monthly license of $300 for the privilege granted by said ordinance of October 3, 1889, to lay and repair water-pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said Company.

"Section 2. That demand is hereby made by said Boise City of and from said The Boise Artesian Hot and Cold Water Company to hereafter pay to said Boise City on the first day of each and every month

said monthly license of $300 required by Section 1 of this Ordinance.

"Section 3. That the City Clerk of said Boise City is hereby required, after this ordinance is in force, to notify said The Boise Artesian Hot & Cold Water Company of the requirements of this ordinance to pay said license as aforesaid.

Section 4. That nothing in this ordinance shall be constructed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid Ordinance of October 3, 1889.

"Section 5. This Ordinance shall take effect and go in force from and after its passage and approval.

"Passed the Common Council of Boise City, Idaho, this 31st day of May, 1906.

"Vetoed by the Mayor June 2d, 1906.

"Passed over the Mayor's veto June 7th, 1906, by a vote of 8 Ayes; 3 Noes." (Record No. 313, p. 47; No. 573, p. 21.)

This ordinance makes no reference to the grant to the Artesian Water and Land Improvement Co. of July 10, 1890, under which the Water Company is also operating.

This ordinance, No. 678, was not passed under any statutory power of taxation or in lieu of the general taxes, and it is stipulated in both suits that every year since the Water Company and its grantors have been engaged in the business of supplying water all of their property, both real and personal, has been duly assessed for all state and county, city and school taxes in like manner and to the same extent and in the same proportion to the value thereof as all other property in said Boise City, and that this company and its predecessors in interest each and every year paid to the proper tax collector the full amount of each and all of the taxes so assessed against its property. (Record No. 313, pp. 15, 23; No. 573, p. 23).

It is conceded that the only ground upon which the authority to pass this ordinance is claimed by the City is

upon the theory that the rights granted to water companies by Section 2840 Revised Codes and to the predecessors in interest of the present company by the ordinances to Eastman Brothers and to the Artesan Water & Land Improvement Company are mere licenses, revocable at the will of the City Council because the period of the duration of these rights was not specified in either of those ordinances.

At the time the ordinance was granted to Eastman Brothers, Idaho was a territory and was admitted into the Union as a State on July 3, 1890. There has not been at any time any constitutional or statutory provisions in force, either in the Territory or the State of Idaho, permitting the repeal or amendment of easements or franchises of this kind, and there was no power of amendment or repeal reserved by the City in any of the grants.

The City does not claim that ordinance No. 678 was passed in the exercise of the police power for the purpose of regulation or that it would come properly within the scope of regulations for the public safety or convenience, or that it comes within the authority granted in Section 2840, *supra,* by the City or town authorities to make reasonable rules or directions as to the mode and manner of using the right-of-way granted by the State in that section of the statute.

In fact, the question at issue is clearly defined in the opinions of both the Circuit Court and the Circuit Court of Appeals, where it is stated that the decision depends upon whether the rights of the Water Company to use the streets are revocable licenses merely, or contracts protected by the Federal Constitution. That if they are revocable licenses merely, the City may enact the ordinance in question imposing the tax of $300 per month, or any

other sum, or wholly repeal and revoke the rights of the Water Company to use the streets and carry on its business within the city. That if they are contracts, then the ordinance in question would clearly be an impairment. (Record No. 313, pages 28, 30, 63).

This, therefore, is the vital question which arises on the record in No. 313 and 573.

Chapter V of Title IV of the Civil Code, Revised Codes of Idaho, entitled "Water and Canal Corporations," also provides:

> "Section 2838. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."
>
> "Section 2839. All persons, companies, or corporations supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use, business houses, lawns and all domestic purposes so long as their supply permits, without distinction of person, upon demand in writing therefor, under such reasonable rules and regulations as the person, company, or corporation supplying water may, from time to time, establish, and at such rates as established in the manner hereinafter specified; and must also furnish water to the extent of its means in case of fire, or other great necessity, at reasonable rates established in the manner hereinafter specified.
>
> "The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the town or City authorities, or when there are no town or City authorities, then by the Board of County Commissioners of the County, the two said

Commissioners so selected to be taxpayers of such town or City; said town or City authorities must, within ten days after the appointment of the two commissioners so seleced, give notice in writing to said person, company or corporation supplying water, of the appointment of such commissioners and the names of each, and within thirty days thereafter two other commissioners, taxpayers of said town or City, must be selected by the person, company or corporation supplying water, and in case a majority of the four commissioners so selected cannot agree on the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer of such town or City, and if they cannot agree upon a fifth commissioner, then the Probate Judge of the County must, within ten days after notice to him by said commissioners that they are unable to agree upon a fifth commissioner, select a fifth commissioner, qualified as aforesaid. The decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, for the ensuing three years from the date of such decision, and until new rates are established as herein provided. The decision of such commissioners so selected must be made within ninety days from the date such Board of Water Commissioners is complete: Provided, that any person, company, or corporation supplying water, and failing or refusing within the time above specified to appoint such commissioners so required of them, shall forfeit the sum of one hundred dollars per day for every day thereafter and until such commissioners are appointed: Provided, further, that nothing in this section contained shall relieve said town or City authorities from their duty to appoint the commissioners herein specified within a reasonable time after the granting of a franchise to any person, company, or corporation, to supply water as aforesaid: Provided, further, that said commissioners shall receive a reasonable compensation for their services in establishing such water rates, one-half of said sum to be paid by the town or City, and one-half by such person, company or corporation supplying

> water: Provided further, that said commissioners shall be empowered to incur any other expense that may be necessary to aid them in establishing such water rates, and one-half of such expense shall be paid by the city or town, and the other half by such person, company, or corporation supplying water."

Case No. 573 arose under this latter section and was commenced by the Water Company in the United States Circuit Court at the same time that No. 313 was removed to that court, to collect from the City the amount claimed to be due for fire hydrants and for fire service in accordance with the rates fixed by the Water Commissioners who were appointed under that statute. The stipulated facts show that in May, 1905, pursuant to Section 2839, two commissioners were appointed by the City and two by the Water Company under and in accordance with that statute, for the purpose of determining the rates to be charged by the Water Company for water for domestic and other purposes, and also for fire purposes within the City. That within ninety days from the time they organized, the commissioners unanimously adopted a schedule of rates to be charged by the Water Company for all purposes required by the statute, including rates to be paid by the City to the Water Company for water for fire purposes. That the schedule of rates adopted by the Board of Water Commissioners went into effect on August 1, 1905, and ever since has been in full force and effect.

That among the rates so fixed were the following:

> "Monthly rates, fire hydrants, $3,000.00 per annum for the fire hydrants now in use and $3.50 monthly for each additional hydrant thereafter established under conditions in supplementary report." (Record No. 573, p. 3).

The supplementary report of the Water Commission deals entirely with water for fire purposes and describes the conditions that must be complied with by the Water Company and by the City, and is found on page 5 of the Record No. 573, and the complete report of the water commissioners, found on page 24, also treats on page 28, with the rate for fire services, and under the issues raised by the City in its answer, it is necessary to refer to those conditions.

The schedule of rates fixed by the water commissioners went into effect in August, 1905, and ordinance No. 678 was passed by the City in June, 1906, so that the latter ordinance was not considered by the water commission in fixing its rates.

From the time the rates went into force, and during all of the time mentioned in the complaint, the City used the water for fire purposes and availed itself of the fire service furnished for the City at a large number of fires. All of the witnesses called by the Water Company, including the Chief and ex-Chief of the Fire Department, former Mayor of the City, and other City officials, all testified to that fact and to the further fact that during all of that period of time the service, the supply and the pressure furnished by the Water Company were always adequate and good. (Record, pp. 51-64).

No evidence to the contrary was introduced by the City.

From August 1, 1905, to May 1, 1906, or during a period of nine months, the City regularly paid to the Water Company the rates for fire purposes, amounting in the aggregate to $2,250.00, although the City continued to use the water and fire service at all times thereafter, and the

action was brought to recover from the City for services up to August 1, 1909, amounting to $10,096.50. (Record No. 573, p. 4).

In case No. 639, in which Boise City is the plaintiff in error, the City seeks to have reviewed by this Court certain rulings of the Court below at the trial relating to the admission of evidence and certain instructions given to the jury, all of which matters are embodied in the bill of exceptions of the City found in the Record on pages 51-73, and in the defendant's assignment of errors on page 75 of the Record.

It is further admitted that the present Water Company, during all times since its incorporation, complied with all laws of the State of Idaho relating to foreign corporations, and especially with Section ..792 Revised Codes, which required the filing of certified copies of its articles of incorporation and the designation of an agent upon whom process may be served. This statute further provides:

> "That foreign corporations complying with the provisions of this section shall have all the rights and privileges of like domestic corporations, including the right to exercise the right of eminent domain, and shall be subject to the laws of the State applicable to like domestic corporations."

The following statute has also been in force at all times during the controversy:

> "For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof, may be levied upon and sold under execution in the same manner and with like effect as any other property."
> Revised Codes, Sec. 2778.

SPECIFICATION OF ERRORS. (NO. 313).

1. The Circuit Court of Appeals erred in not holding that the right-of-way of the Water Company under the streets and alleys of the City for its pipes was granted by the State under Section 2840 of the Revised Codes of Idaho, subject only to reasonable rules and directions of the City authorities as to the mode and manner of using the same, and that when the City authorities provided for the mode and manner of using such right-of-way under the ordinance to the Artesian Water & Land Improvement Company of July 10, 1890, and the Water Company had accepted the grants and expended large sums of money on the faith thereof, a contract was created which could not be impaired by the City.

2. The Circuit Court of Appeals erred in holding and deciding that the ordinances to Eastman Brothers of October 3, 1889, and to the Artesian Water & Land Improvement Company of July 10, 1890, after being accepted and acted upon, were licenses only, "and left the City free at any time to revoke the privilege granted" or "impose a license fee as a condition of their continued enjoyment."

3. The Circuit Court of Appeals erred in not holding that the grant to Eastman Brothers, not being limited as to its duration by its terms, was a grant in fee and would endure at least during the corporate life of the present Water Company.

4. The Circuit Court of Appeals erred in not holding that the grant to the Artesian Water & Land Improvement Company not being by its terms limited as to its duration, was only limited by the provisions of Section 2838, Revised Codes, in force at the time the grant was made, which

provides that no grant of that kind to a corporation must be made for a term exceeding fifty years.

5. The Circuit Court of Appeals erred in not holding that such grants were impaired by ordinance No. 678, and that the ordinance was therefore unconstitutional and void.

6. The Circuit Court of Appeals erred in reversing the judgment of the Circuit Court.

SPECIFICATION OF ERRORS. (NO. 573).

1. The Circuit Court (afterwards District Court) erred in granting defendant's motion to amend its answer by adding thereto a counter-claim for sums claimed to be due under City Ordinance No. 678, over the plaintiff's objection that such ordinance was an impairment of plaintiff's street franchises and therefore void.

2. The District Court erred in granting defendant's motion to allow the counter-claim based on Ordinance No. 678, and to instruct the jury to find for the defendant for the amount based thereon, over the objection of the plaintiff that said Ordinance No. 678 is an impairment of the contracts existing between plaintiff and defendant, growing out of the street franchises held by plaintiff, and is in violation of Section 10 of Article I of the Constitution of the United States; and that Ordinance No. 678 would operate to deprive the plaintiff of its property without due process of law and deny to plaintiff the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

3. The District Court erred in giving the following instructions to the jury: (Record No. 573, p. 30).

"The City has filed an answer to this complaint, admitting certain of the allegations and denying others, and also affirmatively setting up what in law we call a counter-claim, by which it claims from the Water Company compensation for the use of its streets, the compensation being called a license fee, at the rate of $300.00 a month from a certain date, the date of the publication of the ordinance or resolution requiring such license fee to be paid. I will say to you now in this connection that it is your duty to find in favor of the City for the full amount of this license claimed, together with interest thereon, the amount, including the interest, being agreed upon as $1,783.40. In other words, the City is entitled to recover that amount from the Water Company and the only question with you will be whether judgment is to be awarded to the City for that amount, or whether it is to be credited upon the amount, if any, due from the City to the Water Company for this water service. In other words, if, under the evidence, and the instructions which I shall give you upon that phase of the case, you find that the City owes the Company for water service, then you will just credit upon that amount this $1,783.40. If, upon the other hand, you find nothing is due from the City to the Water Company for water service, your verdict should be in favor of the City for $1,783.40, so that judgment can be entered upon such verdict. I think that is all that it is ncessary to say upon that point."

To which instruction counsel for plaintiff then and there, and before the jury retired, duly excepted on the ground that the counter-claim mentioned in said charge was based upon Ordinance No. 678 of said Boise City, passed June 7, 1906, and that said ordinance was in violation of Section 10 of Article 1 of the Constitution of the United States in that it was an impairment of the contracts existing between said plaintiff and said defendant, arising out of the franchises held and owned by plaintiff for the use of defendant's streets in the supplying of water

to defendant and its inhabitants, and for the further reason that said Ordinonce No. 678 would operate to deprive the plaintiff of its property without due process of law and deny to plaintiff the equal protection of the law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States; and for the further reason that it was beyond the legislative powers of the Common Council of said defendant to enact said Ordinance No. 678. (Record p. 30-31).

ARGUMENT.

I.

THE WATER COMPANY POSSESSES RIGHTS OF WAY FOR THE LAYING OF ITS PIPES UNDER THE STREETS AND ALLEYS OF THE CITY OF BOISE GRANTED BY THE STATE OF IDAHO BY SECTION 2840 REVISED CODES, AND BY THE ORDINANCE OF BOISE CITY APPROVED JULY 10, 1890, TO THE ARTESIAN WATER AND LAND IMPROVEMENT COMPANY, PASSED UNDER AUTHORITY CONTAINED IN THAT SECTION, AND ALSO BY THE ORDINANCE OF OCTOBER 3, 1889, TO THE EASTMAN BROTHERS, AND THESE GRANTS, AFTER BEING ACCEPTED AND CARRIED OUT, WERE NOT REVOCABLE LICENSES MERELY BECAUSE THEY WERE INDEFINITE AS TO TIME.

The proposition that the grant of a right to supply water or gas to a municipality and its inhabitants through pipes and mains laid in the street, upon condition of the

performance of such service by the grantee, is the grant of a franchise vested in the State, and after performance by the grantee is a contract protected by the Constitution of the United States against impairment by the State or any of its agencies, is so well established by the decisions of this Court, that it is not controverted by the City.

Walla Walla vs. Walla Walla Water Co. 172 U. S. 1, 9.

New Orleans Gas Co. vs. Louisiana Light Co. 115 U. S. 650, 660.

Hamilton Gas Light Co. vs. Hamilton, 146 U. S. 258, 266.

New Orleans, etc. Co. vs. New Orleans, 164 U. S. 471.

Los Angeles vs. Los Angeles City Water Co. 177 U. S. 558, 577-78.

Vicksburg Waterworks Co. vs. Vicksburg, 185 U. S. 65, 80-82.

Vicksburg vs. Waterworks Co. 202 U. S. 453.

The only distinction attempted to be made by the Court below between those cases and the cases at bar was that, no duration of time being specified in the two city ordinances, they must either be treated as perpetual grants or revocable licenses and that there is no middle ground between these two views, and that no express authority being shown authorizing the State or City to grant perpetual franchises, they must be presumed to be revocable licenses merely. See opinion of Circuit Court of Appeals. (Record in No. 313, p. 63-65).

The case of *Water Company vs. Boise City,* 123 Fed. 232, cited by the Court on page 65, involved only the

question of the constitutionality of Sec. 2839, Revised Codes, formerly Sec. 2711 Rev. Stat. before its amendment, when it provided that the Water Company must furnish water to the City free of charge for fire purposes and other great necessities. What was said by the Court in that case about the Eastman ordinance being a revocable license was *dicta* merely and not necessary to a decision of the case. Judge Gilbert, who wrote the opinion in that case, tried the present case No. 313, in the Circuit Court and distinguished it from the prior case in 123 Federal, and held that the grant to the Artesian Water and Land Improvement Company of July 10, 1890, was not before the Court in the former case, and that this grant was a franchise for fifty years and not a revocable license and that ordinance No. 678 was illegal and of no effect, being an impairment of that franchise. (Record No. 313, p. 27-30).

In case No. 573, District Judge Dietrich followed the opinion of the Circuit Court of Appeals in the prior suit, in instructing the jury with reference to the counter-claim of the City, which was based upon Ordinance No. 678.

Since these decisions by the lower courts in these two cases, this Court has settled the questions involved, in the case of

Louisville vs. Cumberland Telephone and Telegraph Co. 224 *U. S.* 649.

It is admitted in both of the present cases that the Artesian Water & Land Improvement Company, grantee of the ordinance of July 10, 1890, was organized under the provisions of Chapter V, Title IV, of the Civil Code of Idaho, relating to Water and Canal Corporations, of which

Sec. 2840 was a part. Under that Section, that company was given the right

> "subject to the reasonable rules and directions of the City or town authorities as to the mode and manner of using such right-of-way within the city or town * * * to use so much of the streets, alleys and ways in any city or town * * * as may be necessary for the laying of pipes for conducting water to its consumers * * * ."

The ordinance of July 10, 1890, to that company recognized and confirmed this right and prescribed such rules and directions as the City saw fit to require with reference to the mode and manner of using such right-of-way.

No power was reserved to withdraw, repeal or amend this grant and no provision of law is pointed out by the City, and none existed at that time, under which it could be revoked or amended. The right according to its express terms was assignable and is now held by the present Water Company, who succeeded to the water system and plant and all of the property and rights of every kind of the Artesian Water & Land Improvement Company.

The present Water Company was chartered for a period of fifty years from September 1, 1900, the date of its incorporation, and its period of existence as a corporation extends to September 1, 1950. (Record No. 313, p. 11-12, 22).

In the absence of Section 2838, which prescribes that no grant of this kind must be made for a term exceeding fifty years, there can be no question but that under the decision of this Court in the Louisville case last cited, and the cases cited in the opinion, the grant would at least endure during the corporate life of this company, which would be until September 1, 1950. The grant having been

made, however, on July 10, 1890, while that statute was in force, it was not legal to make it extend beyond July 10, 1940. This was the period limited by Judge Gilbert for its duration in his decision in the Circuit Court.

It may safely be assumed that Sec. 2838 established the policy of the State with reference to the duration of grants of this kind and that fifty years was considered a reasonable time, in view of the fact that under that section no exclusive rights for that purpose could be granted. This was also the policy of the City, as shown by the grant to the Capital Water Company, a company in competition with the plaintiff in error in supplying water in Boise City, and which was granted a fifty-year franchise by the City. (Record No. 313, p. 16, 23).

The reasoning of the Court below rests entirely upon the principle that grants of this character are construed most strongly in favor of the public and against the holders of the grants. The question here, however, is not the construction of ambiguous language in the grants themselves, but rather to ascertain the intention of the parties, with reference to the duration of the grants.

It is admitted that the Water Company and its predecessors, in carrying out the terms of the grants, have expended over $400,000 in sinking artesian wells, building reservoirs, laying pipe lines and installing expensive pumping plants. The language of this Court in *Louisville vs. Cumberland Telephone Co.* 224 U. S. 663, regarding a telephone system applies with equal force to a water system:

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits,

wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense of installing these necessary and costly fixtures if they were removable at will of the City and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint.

"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the Company, all of which were perpetual and none of which could be exercised without this essential right to use the streets. The duration of the public business in which these permanent structures were to be used, the express provision that franchises could be mortgaged and sold, the nature of the grant, and the terms of the charter as a whole, compel a holding that the State of Kentucky conferred upon the Ohio Valley Telephone Company the right to use the streets to the extent and for the period necessary to enable the Company to perform the perpetual obligation to maintain and conduct a telephone system in the City of Louisville. Such has been the uniform holding of courts construing similar grants to like corporations. *Milhau vs. Sharp*, 27 N. Y. 611 (1863); *Hudson Telephone Co. vs. Jersey City*, 49 N. J. L. 303; *Mobile vs. L. & N. R. R.* 84 Alabama, 122; *Seattle vs. Columbia & P. S. R. R.* 6 Washington, 379, 392; *People vs. Deehan*, 153 N. Y. 528. The earlier cases are reviewed in *Detroit St. R. R. vs. Detroit*, 64 Fed. Rep. 628, 634, which was cited with approval in *Detroit vs. Detroit St. R. R.* 184 U. S. 368, 395, this Court there saying that 'Where the grant to a corporation of a franchise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee.'"

The only difference between that case and the cases at bar is that the telephone company was given a perpetual charter to be a corporation and there was no statutory limitations as to the length of time for which such grants to use the streets should be made, consequently the grants were construed to be co-ordinate in duration with the corporate life of the holder, and not revocable licenses.

By analogy, and for the same reasons, the privilege granted by the State under Section 2840, Revised Codes, supplemented by the ordinance of July 10, 1890, would endure, as an essential adjunct to the corporate existence of the Water Company to enable it to carry out the purposes for which it was formed, until the expiration of the fifty-year period to which the grant is limited by Section 2838.

If it transpired that the corporate life of the Water Company holding the grant expired before the limit of fifty years was reached and its life was not extended, this grant would be an asset in the winding up of the corporation along with its other property, or it could be transferred to another company, qualified to exercise it, whose corporate life was long enough to carry it on, because by its express terms it is assignable, and under Section 2778, above quoted, the franchises of any corporation authorized to receive tolls may be sold under execution the same as any other property.

Detroit vs. Detroit Citizens' Street Ry. Co. 148 U. S. 393, 396.

People vs. O'Brien, 111 N. Y. 1.

Minneapolis vs. Street Railway Co. 215 U. S. 417, 430.

In this case, however, the corporate life of the present company extends to September 1, 1950, or beyond the fifty-year limitation imposed by Section 2838 on the grant to the Artesian Water & Land Improvement Company of July 10, 1890, which expires July 10, 1940.

In States like Idaho, where the State statutes authorize water companies or other public service corporations to use the streets of cities and towns for their pipes or poles, wires and tracks, upon obtaining the consent of the authorities thereof, and such consent is granted and the company proceeds in good faith to carry out its purposes and erects an expensive plant, the courts have uniformly held that a contract is thereby created which cannot be impaired, although no time is expressed for the duration of the grant.

While in a constitutional question of this kind it is needless to cite authorities outside of the decisions of this Court, yet we find able discussions of this question by other courts.

In *Suburban Electric Light and Power Co. vs. Inhabitants of East Orange Township* (Court of Ch. of N. J.) 41 Atl. 865, the right to use the streets was given by the general statutes of the State, as it was in this case by Section 2840, Revised Codes of Idaho, with the proviso that the consent of incorporated cities and towns must be first obtained. This consent was given by resolution dated October 14, 1895. We quote now from the opinion of the Vice Chancellor:

> "No right was reserved to the township authorities in the resolution of October 14, 1895, to revoke the same, nor was any limitation fixed upon the time during which the wires strung under it should remain. A resolution rescinding that resolution was, after the

stringing of the wires, passed by the municipal authorities, and it is claimed by the defendant that it was authorized to make such rescission, and that then rescinded, the authority of the complainant to maintain its wires was destroyed. This argument is based upon the ground that the permission was a mere license, revocable at the pleasure of the licensor. I am unable to adopt that view. Considering it as a mere license, it is still a license which has been acted upon, and may not be revoked at the pleasure of the licensor. In support of this proposition, I refer without citing at length, to the clear and forcible language and reasoning of Justice Reed in the case of *Hudson Telephone Co. vs. Jersey City,* 49 N. J. Law 303, 8 Atl. 123, at pages 305, 306, 49 N. J. Law and pages 124, 125, 8 Atl. Moreover, the complainant's right to string the wires does not depend alone, if at all, upon the consent of the municipal authorities; it relates back to the legislative authority to string and maintain the wires upon certain conditions. No time is fixed by the legislative authority for the continuance of the exercise of the franchise and the grant must be presumed to be perpetual, subject, it may be, as it probably is, to the right of the Legislature to exercise upon it its police powers from time to time, as it in its wisdom may see fit."

This decision was affirmed by the Court of Errors and Appeals of New Jersey, 59 N. J. Eq. 563; 44 Atl. 628.

Also in *Wyandotte Elec. Light Co. vs. Wyandotte,* 124 Mich. 43, 47, the electric light company's act was similar in substance to the Idaho law, in that it permitted the use of the streets to corporations organized under its provisions, after obtaining the consent of the city. Referring to that act the Court said:

"An incorporation under this act, a petition to the city to erect poles and wires, or for a franchise for that purpose, and the grant of the same by the city would make a contract binding for the life of the corporation. It would be immaterial that no time for the existence of the right of the franchise was specified.

> The grant in such case would be limited to the period of existence fixed by the charter. If a railroad company were organized for a period of 30 years, and a party, natural or corporate, should grant it a right of way without specifying the time of user, the grant would be for the lifetime of the corporation. The law would imply that both parties contracted with reference to its period of existence. The same rule is applicable here. *St. Clair County Turnpike Co., vs. Illinois*, 96 U. S. 68."

Michigan Telephone Co. vs. City of St. Joseph, 121 Mich. 502; 80 N. W. 383.

People ex rel, Flatbush Gas Co. vs. Coler, 103 N. Y. Supp. 590, referred to at length by Judge Gilbert in his opinion (Record No. 313, p. 29) is also directly in point, as well as the other cases cited by him to sustain the contention that the statute, Sec. 2838 Rev. Codes (formerly Sec. 2710 Rev. Statutes of 1887), limited the duration of the grants to fifty years.

In *City of New Orleans vs. Telephone & Telegraph Co.* 40 La. Ann. 41; 3 So. 533, a tax was attempted to be levied for the use by the company of the streets, on the theory, as in the cases at bar, that the company had merely a revocable license to use the streets, because there was no time limit contained in the grants.

The Court, after declining to accept the contention that the tax was a proper police regulation, said:

> "The only remaining question is whether, after granting the defendant authority to construct and to maintain its lines without limitation as to time, and with no other consideration than the furnishing of certain free telephonic facilities to the city, after the defendant has, at great expense, established its plant and constructed its lines, and when it has fully complied with all the conditions imposed, the city can now

exact this large additional consideration for the continued enjoyment of privileges already granted. If the city can do this now, she could have done it the very day after the defendant had completed its lines, when it had incurred all the expense, and before it had reaped a particle of return. If she can impose a charge of five dollars per pole, she can, with equal power, impose one of $1,000 and for that matter, she could arbitrarily revoke the grant at her pleasure. Either she is bound, according to the terms of her proposition accepted and acted upon by the defendant, or she is not bound at all. Obviously, upon the clearest consideration of law and justice the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new or more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518."

There does not seem to have been a statute as in Idaho precluding the grant from extending more than fifty years. Although that statute only applies to corporations and did not apply to limit the grant to Eastman Brothers, and although the City had ample power in its charter to grant a perpetual franchise to Eastman Brothers, the Water Company has never insisted upon a perpetual right to use the streets growing out of the Eastman ordinance but has been willing to concede that its rights are governed by the Ordinance to the Artesian Water and Land Improvement Company, as held by Judge Gilbert in the Circuit Court.

The Circuit Court of Appeals for the Sixth Circuit, discussing the effect of a similar City ordinance giving consent to use the streets in *Board, etc. of Morristown, Tenn. vs. East Tenn. Tel. Co.*, 115 Fed. 304; 53 C. C. A. 132, said:

"The consent to the occupancy of the streets by the poles and wires of the telephone company for the purpose of maintaining a public telephone system was the grant of an easement in the streets and a conveyance of an estate or property interest, which, being in a large sense the exercise of a proprietary or contractual right rather than legislative, was irrevocable after acceptance, unless the power to alter or revoke was reserved. This principle has too many times been declared and applied by this Court to require further elaboration. *Detroit Citizens St. Ry. Co. vs. City of Detroit,* 12 C. C. A. 365; 64 Fed. 628; 26 L. R. A. 667; *Louisville Trust Co. vs. City of Cincinnati,* 22 C. C. A. 334; 76 Fed. 296; *Iron Mountain R. Co. vs. City of Memphis,* 37 C. C. A. 416; 96 Fed. 113; *Citizens Ry. Co. vs. Africa,* 23 C. C. A. 252; 77 Fed. 501."

In *Mayor, etc. of Knoxville vs. Africa,* 77 Fed. 501, 23 C. C. A. 252, the Circuit Court of Appeals of the Sixth Circuit, on page 505 of 77 Fed. said:

"A right of way upon a public street, whether granted by act of the legislature, or ordinance of a city council or in any other valid mode is an easement and as such is a property right capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts. *City of Detroit vs. Detroit Citizens St. Ry. Co.* 22 U. S. App. 570, 12 C. C. A. 365 and 64 Fed. 628; *Louisville Trust & Banking Co. vs. City of Cincinnati* (decided at present term) 76 Fed. 296."

In the State of Kansas there was a provision of the statute to the effect that franchises of this kind could not be granted for more than twenty years. In construing this the Circuit Court, in *Old Colony Trust Co. vs. Wichita,* 123 Fed. 762, held:

"A franchise granted by a city of Kansas to a telephone company to erect and maintain its poles and wires in the streets, no term being stated, under the laws of the State continues for 20 years, and during

such term the city has no power to nullify it, in the absence of any provision therein reserving such right."

This decision was affirmed on appeal by the Circuit Court of Appeals of the Sixth Circuit.

In the case of *City of Los Angeles vs. The Los Angeles City Water Co.* 61 Cal. 65, the Supreme Court, in bank, held that a license imposing upon all persons or corporations, not municipal, vending water for domestic purposes, monthly rates or licenses was void. The Court held that the Water Company had previously obtained its license or permission to use the streets and vend water, and that the City could not, of its own motion, increase the amount to be paid for the privileges granted. The Court also cites and quotes from *Stein vs. Mayor of Mobile,* 49 Ala. 362, showing that the ordinance complained of is not a police regulation but was a tax in restraint of a privilege already granted to carry on its business in the city, and, being an impairment of the original grant, was void. The Court used this language which is in point here:

> "The principles enunciated in the foregoing cases, are eminently sound and just, and are directly applicable to the case we are now considering. The City of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterwards to impose additional burdens as a condition to the exercise of the rights and privileges granted."

This Court, in *Los Angeles vs. Los Angeles City Water Co.* (*supra*), 177 U. S. 577-78, cited that case and quoted the above language with approval.

In *People vs. O'Brien*, 111 N. Y. 13, *supra*, which is one of the leading cases on this question, the consent of the municipal authorities was treated as the muniment of title to the grant, and it was held that, when acted upon, it constituted a property interest which would endure in perpetuity, where it was not specifically limited in time, there being no limitation upon the power of the city to grant such easement in perpetuity.

This has been the uniform ruling of the New York courts in:

People vs. Sturtevant, 9 N. Y. 263.
David vs. Mayor, 14 N. Y. 506.
Milhau vs. Sharp, 27 N. Y. 611.
Moyor vs. Railroad Co. 32 N. Y. 261.
Railroad Co. vs. Kerr, 72 N. Y. 330.
Re Brooklyn, 143 N. Y. 569.

Other cases announcing the same rule are:

National Waterworks Co. vs. Kansas City, 65 Fed. 691, 695, in which the opinion is by Mr. Justice Brewer.

Baltimore Trust Co. vs. Mayor of Baltimore, 64 Fed. 153.

Gavin vs. City of Chicago, 132 Fed. 848.

Turnpike Co. vs. Illinois, 96 U. S. 63.

In *Rutland Electric Light Co. vs Marble City Electric Light Co.* 65 Vt. 377; 26 Atl. 635, the Court recognizes the following principle:

> "So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee, by a compliance with

its conditions, becomes a contract which the city cannot abolish or alter, without consent of the grantees."

The Supreme Court of Illinois has recognized the same principle, *Chicago Municipal Gas Light and Fuel Co. vs. Town of Lake,* 130 Ill. 42; 22 N. E. 616, in which permission was given by the city to lay gas pipes in the streets and to maintain and repair the same, no time being specified for the duration of the right. The Court held that such a grant when acted upon was not a mere revocable license, but a contract.

To the same effect is *Gregsten vs. City of Chicago,* 145 Ill. 451; 34 N. E. 426, where the Court construed the grant to be perpetual.

In *Arcata vs. Arcata and Mad River R. Co.* 92 Cal. 639, 644, the town trustees made an order dated March 9, 1885, granting to the railroad company "the right to lay and maintain a side track" on certain streets "subject to such rules and conditions as the board of trustees may think proper and just."

There was no limitation of time during which this right might be enjoyed.

The Court, on page 645, said:

> "There is no merit in the contention that the order of March 9, 1885, was a mere license revocable at the pleasure of the board. After the defendant had acted upon the terms of the order, and expended money in the construction of the road, the board could not rescind or recall the privilege it had granted, unless the company failed to comply with the terms or conditions of the grant."

In *Savage vs. City of Salem,* 23 Ore. 381; 31 Pac. 832; 37 Am. St. 688; 24 L. R. A. 787, the city granted plaintiff permission, for an indefinite time, to erect tanks in certain

places on the public streets to supply water for street sprinkling purposes. The city attempted to revoke the license, and contended: First, that the city had no power to authorize the erection of the tanks because they were for a private purpose and therefore nuisances per se, which could be abated at any time; and, second, that if this is not so, the permission to erect them was but a mere license, revocable at the pleasure of the city.

After holding that the tanks were for a public purpose and not a nuisance, on the second point the Court stated the rule in the following language:

> "After the municipality has granted a license or franchise to a private person or corporation to occupy a portion of a street for public purposes, and the licensee has acted upon such grant, and expended money on the faith thereof, the city cannot revoke the license without compensation to the owner, unless the erection or structure so authorized is, or has in fact by subsequent use, become an actual nuisance. *I Dill Municipal Corp.* 314; *Hudson Tel. Co. vs. Jersey City*, 49 N. J. Law, 303; *Com. vs. City of Boston*, 97 Mass. 555."

The Supreme Court of Alabama followed the same rule in *Port of Mobile vs. Louisville & Nashville Railroad Co.* 84 Ala. 115; 4 So. 106; 5 Am. St. Rep. 342.

The permission to use the particular street in that case was granted by the city under authority from the State, and was without limitation as to time.

The Court held that the privilege thus granted was a franchise of the most valuable kind, and could not be revoked by the city.

In *Indianapolis vs. Consumers' Gas Trust Co.* 140 Ind. 107, there was no time limit in the ordinance granting the use of the streets for laying and maintaining the gas pipes.

It was held that such a grant is a legislative contract investing the company with the right of property in the franchise thus granted which the city cannot take away or impair, without the company's consent, by any subsequent act, unless such right is reserved.

To the same effect are:

Borough of Shamokin vs. Ry. Co. 178 Pa. St. 128.
Providence Gas Co. vs. Thurber, 2 R. I. 15.

The foregoing cases conclusively establish the principle that grants of this character are not revocable licenses. While there may be a difference of opinion among some of the authorities as to whether the grant is in perpetuity or only during the life of the corporation that is exercising it, it is clear that the law is settled that in the case at bar the grants would run for the period of time to which they are limited by Section 2838 of the Code, or fifty years, regardless of the life of the corporation.

THE CITY IS ESTOPPED FROM CLAIMING THAT THE WATER COMPANY IS OPERATING UNDER LICENSES REVOCABLE AT THE WILL OF THE CITY.

For a period of sixten years, until the pasage of Ordinance No. 678, the City authorities have always recognized the right of the Water Company and its grantors to lay and maintain their pipes and mains in the streets and alleys of the City and have dealt with the Water Company in the matter of fixing rates, ordered the present company to install a large number of additional fire hydrants, for use by the city fire department (Record No. 313 p. 10; No. 573, p. 56), and permitted it to install a large electrical pump for fire pressure only (Trans. 573 p. 55) and to expend large sums in the extension of its plant.

In *National Waterworks Company vs. Kansas City*, 65 Fed. 691, Mr. Justice Brewer, in delivering the opinion, used the following language on the question of estoppel:

> "The rule is recognized in this State, as elsewhere, that where one party enters upon the real estate of another, under a parol license from the latter, and at large expense constructs an improvement which is necessary for the successful carrying on of the business of the licensee, the licensor is estopped to deny the right of the licensee to continue such occupancy and use so long as the necessities of his business require. Among other authorities, are the following: *House vs. Montgomery*, 19 Mo. App. 170; *Baker vs. Railroad Co.* 57 Mo. 265; *Chiles vs. Wallace*, 83 Mo. 84; *Le Fevre vs. Le Fevre*, 4 Serg. & R. 241; *Rerick vs. Kern*, 14 Serg. & R. 267; *Campbell vs. Railroad Co.* 110 Ind. 490, 11 N. E. 482; *Wilson vs. Chalfant*, 15 Ohio 248; *Clark vs. Glidden*, 60 Vt. 70., 15 Atl. 358; *Brewing Co. vs. Morton*, 47 N. J. Eq. 158, 20 Alt. 286; *Duke of Devonshire vs. Eglin*, 14 Beav. 530. In *Rerick vs. Kern*, 2 Am. Lead. Cas. (5th Ed.) 569, Messrs. Hare & Wallace, after reviewing the authorities, say:
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> "'From the cases which have been cited, we may deduce two things: * * * A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed, with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and thus placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises, under these circumstances, to prevent the legal title from being used as a means of injustice.'"

It would seem that the doctrine of estoppel should apply with greater force to a written grant.

In *Union Depot Co. vs. St. Louis*, 76 Mo. 393, 396, it

was held that where a city had granted a franchise to a Union Depot Company to use and occupy streets and the company had erected costly buildings thereon, the city cannot afterwards object. The Court said:

> "When a municipal corporation enters into a contract which it has authority to make, the doctrine of estoppel applies to it with the same force as against individuals."

In *Omaha Water Co. vs. City of Omaha,* 156 Fed. 922, similar in many respects to this case, the Circuit Court of Appeals of the Eighth Circuit held that a municipal corporation, in respect of its purely business relations as distinguished from those that are governmental, is held to the same standard of just dealing that the law prescribes for private individuals.

In *Omaha and Council Bluffs St. R. Co. vs. City of Omaha,* 90 Neb. 6; 132 N. W. 733, the Court held that the city was estopped to deny the right of the company to engage in a certain line of business in the city because it not only permitted but induced the company to expend large sums of money and acquire valuable property.

The Court said:

> "A like question was before us in the case of *State vs Lincoln Street R. Co.* 80 Neb. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336, where it was said: 'The courts, in a proper case, will apply the doctrine of laches to a case in which the State is a party plaintiff. The State, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.'"

In *People vs. Union Gas and Electric Company,* 254 Ill. 395; 98 N. E. 768, the city had required the company to

place its wires underground and had permitted the company to extend its plant and lay certain gas mains, and had made no objections to the issuance of bonds by the company and had treated the company for a period of ten years as if it were inthe lawful exercise of its franchise. The Court held that it would be contrary to well-settled law and to the principles of fair dealing if the city could now oust it from continuing the exercise of its franchise because permission was not granted it to do so by ordinance.

In *Illinois Trust and Savings Bank vs. City of Arkansas City,* 76 Fed. 271, the Circuit Court of Appeals pointed out the settled distinction between the governmental or public and the proprietary or business powers of the city, and said:

> "In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and is denizens." (Citing authorities.)

On page 293 of 76 Fed. the Court also said:

> "There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract, which its records and its conduct have constantly made, and in reliance upon which, the gas company and the water company constructed and extended the waterworks and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the dam-

age of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. (Citing authorities). This principle is as applicable to the transactions of corporations as to those of individuals. As Mr. Justice Campbell well said in *Zabriskie vs. Railroad Co.* 23 How. 381, 400, 401, in which the Supreme Court held that a corporation was estopped to question the validity of its void guaranty, because it had permitted the circulation of bonds that carried it: 'A corporation, quite as much as an individual, is held to a careful adherence to truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.' In a business transaction like that of procuring the construction of waterworks and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private indidividuals and corporations." (Citing a large number of authorities).

SECTION 2838 OF THE REVISED CODES LIMITING GRANTS TO CORPORATIONS TO SUPPLY CITIES AND TOWNS WITH WATER TO A TERM NOT EXCEEDING FIFTY YEARS WAS IN FORCE JULY 10, 1890, WHEN THE ARTESIAN WATER AND LAND IMPROVEMENT COMPANY AND ITS SUCCESSORS AND ASSIGNS BECAME AUTHORIZED UNDER SECTION 2840 OF THE SAME CODE SUPPLEMENTED BY THE CITY ORDINANCE OF THAT DATE, TO USE THE STREETS AND ALLEYS OF BOISE CITY FOR THE LAYING OF ITS PIPES, AND BOTH SECTIONS WERE A PART OF THE SAME CHAPTER RELATING TO WATER

CORPORATIONS, AND UNDER THE SETTLED DOCTRINE OF THIS COURT SECTION 2838 ENTERS INTO AND FORMS A PART OF THE CONTRACT, AS MUCH AS IF IT WERE EXPRESSLY REFERRED TO OR INCORPORATED THEREIN, AND IS PART OF THE OBLIGATION WHICH IS GUARANTEED BY THE UNITED STATES CONSTITUTION AGAINST IMPAIRMENT.

In *Walker vs. Whitehead*, 16 Wall, 314, 317, the Court held that laws existing at the time and place of making a contract, and where it is to be performed whenever they affect its validity, construction, discharge and enforcement, enter into and form part of the contract and no subsequent legislation could alter them, and that they are parts of the obligation which is guaranteed by the Constitution against impairment.

Such has been the uniform ruling of this Court:

Von Hoffman vs. City of Quincy, 4 Wall. 550.
Tomlinson vs. Jessup, 15 Wall. 457.
Edwards vs. Kearzey, 96 U. S. 595, 601.
Brine vs. Insurance Co. 96 U. S. 627, 634, 637.
Pritchard vs. Norton, 106 U. S. 124.

It is much more natural to presume that in this case the parties acted with reference to Section 2838 than it would be to presume that they acted with reference to the period of the corporate existence of the corporation receiving the grant, as is held in many cases. This section was part of the chapter governing water corporations, under which the Water Company obtained its right to use the streets. It may happen that the corporation is incorporated after the grant is made, so that the parties could not have had in mind the period of the chartered life of the company. In this case, however, the period limited by the statute af-

fords a fair and reasonable solution of the question of the duration of the grant. Such a construction works no hardship whatever on the City, because the grant is not exclusive and is not perpetual and the City is fully protected in the matter of rates. Such a period of time was considered reasonable, by the framers of the statute since capital could not be induced to invest money in building water works in a sparsely settled community, where returns would be so uncertain, unless sufficient time were allowed for the growth of the city to justify the investment.

THE CONTENTION THAT SECTION 2838, REVISED CODES, LIMITING FRANCHISES OF THIS KIND TO FIFTY YEARS, DOES NOT APPLY TO BOISE CITY, BECAUSE THE CITY WAS OPERATING UNDER A SPECIAL CHARTER, IS WITHOUT MERIT.

This question was urged by the City in the court below and the case of *Boise City National Bank vs. Boise City*, 15 Ida. 792, was relied upon to sustain this contention.

In 1895, however, when Boise City was operating under the same special charter, the City brought an action against one of the predecessors of the present company to compel it to furnish water for fire purposes free of charge under Section 2839 of the Code, which was then Section 2711 of the Revised Statutes of 1887. The Supreme Court held that the complaint of the City must set forth the ordinances or contracts under which the Water Company was supplying water as required by Section 2710, which is now Section 2839, and the Court recognized the application of that section to Boise City.

City of Boise vs. Artesian Hot & Cold Water Company, 4 Ida. 351.

The City in commencing that suit insisted upon the application of Section 2711 (now Section 2839) which is part of the same chapter, because its contention that the Water Company must furnish water free for fire purposes was based entirely on that section.

Moreover, on page 52 of the Record, in case No. 573, counsel for the City objected to the introduction of any evidence by the Water Company on the ground that the complaint failed to state a cause of action in certain particulars, among which was:

> "3. That the complaint alleges no ordinance or contract under which the plaintiff company ever has been, or is now, authorized to furnish water to the defendant City as required by the Idaho Revised Codes, Sec. 2838 (*Boise City vs. A. H. & C. W. Co.* 4 Idaho, 351)."

Here the City contends that Section 2838 does apply to the City and the Water Company, which is unquestionably true.

Moreover, an examination of the case of *Boise City National Bank vs. Boise City* clearly shows that the Court did not hold that the general corporation laws of the State have no application in cities governed by a special charter, but only that the general laws relating to the government of cities and villages not under special charter have no application in purely municipal matters to questions covered by the provisions of the special charter. In that particular case it had to do with the manner of paying for sewer construction. The general laws governing cities and villages permitted the payment to be made in ten annual installments. The special charter of Boise covered fully the matter of sewer construction and pro-

vided for a different method of payment, and the Court held that the general law did not apply.

It is clear that the chapter of the Code relating to water corporations does not deal primarily with the government of cities and towns or municipal affairs and applies throughout the State. It is only incidently that it affects Boise City and it relates to matters not dealt with in the special charter. It would follow that the decision relied upon can have no bearing upon this case.

THE ORDINANCES UNDER WHICH THE PRESENT COMPANY IS OPERATING WERE TRANSFERABLE.

In the court below, the City contended that the grants to Eastman Brothers and to the Artesian Water and Land Improvement Company were not assignable without express permission of the City. If this question is again presented in this Court we will only call attention to the fact that the ordinances by their express terms run to the grantees and their successors and assigns, and the City in dealing with the present company in the manner hereinbefore referred to is estopped to contend that the present company is not the lawful holder of those grants.

Moreover, this Court, in the recent case of *Louisville vs. Cumberland Telephone Co.* 224 U. S. 649, before cited, disposed of this question adversely to the contention of the city.

The Supreme Court of Idaho made a similar ruling in *Evans vs. Kroutinger,* 9 Idaho, 153; 72 Pac. 882, and also held in the same case that the question of the right of the assignee of a franchise to exercise its rights and privileges can, under the laws of Idaho, only be raised in *quo warranto* proceedings brought by the franchise granting power.

II. POINTS RAISED IN ASSIGNMENT OF ERRORS BY CITY IN WRIT OF ERROR NO. 639.

Motion for non-suit by City at beginning of trial (Record p. 51-52) was made upon four grounds, which we will discuss in their order.

1. When the ordinances to Eastman Brothers and the Artesian Water & Land Improvement Company were passed, Section 2711 (now Section 2839 as amended), which required water companies to furnish water for fire purposes free, was in force and that section was an implied condition in the grant and constituted a contract thereafter binding on the Water Company, and the Act of March 9, 1905, in so far as it amended Section 2711 and repealed the clause providing for free water was unconstitutional under Article 1, Section 10 of the Constitution of the United States.

The contention, in other words, is that the Act of March 9, 1905, did not operate to repeal the free water clause of Section 2711 as against the present Water Company.

Section 2711 was taken into the Idaho Revised Statutes from California, verbatim, and the same question arose in California.

In *Spring Valley Water Works vs. San Francisco*, 61 Cal. 18, the Supreme Court held that this provision of the statute requiring water companies to furnish water for fire purposes and other necessities free of charge was abrogated by the new Constitution of California, and that such companies were thereafter relieved from such obligation.

This question of the free water clause being a contract was fully discussed by Judge Sharpstein in his concurring

opinion on page 30, and fully disposes of the City's contention here.

2. That Sections 2838, 2839 and 2840, relating to water companies, being general laws, do not apply to Boise City because the city is operating under a special charter, has been fully discussed elsewhere in this brief. (Supra, p. 46.)

3. That the complaint alleges no ordinance under which the Water Company ever has been or is now authorized to furnish water in Boise City, as required by Section 2838.

On this point the City relies upon *Boise City vs. Artesian Hot & Cold Water Co.* 4 Idaho, 351; 39 Pac. 562.

This objection may be disposed of by calling attention to the fact that paragraphs IV and V of the Complaint (Record pp. 2-3) sets forth the Eastman Brothers' ordinance and the Artesian Water and Land Improvement Company's ordinance, under which the present company is, and its predecessors were, authorized to furnish water to the City and its inhabitants. They were also given this right by Section 2840, Revised Codes.

4. The fourth contention is disposed of by reference to pages 56-57 of the Record, where Mr. Howe, the Secretary of the company, testified:

> "We took our bills to the City Clerk of the auditing committee and we swore to every one. The clerk makes out the list and takes them to the auditing board and that was the course we pursued with reference to those bills and demand for their payment."

This was not disputed and complies with the statute.

The next contention of the City was that the rates established by the water commission for fire purposes were not

binding on the City because no formal contract between the City and the Water Company is shown by which the City agreed to pay those rates. (Record, p. 65-66).

The Court held that, under thq evidence, the jury would be justified in finding an implied contract on the part of the City to pay for the services at the rates established, and discussed the matter quite fully, after the jury had retired, on pages 66-67 of the Record, and a portion of the Court's instructions to the jury on this question is found on page 69.

Moreover, the Record shows that the water commissioners were appointed under Section 2839 of the statutes of the State, which makes the report of the commission binding, both upon the City and the Water Company for a period of three years, and until new rates are established. The statute was set in motion by the City Council which first appointed two commissioners, and it became the duty of the Water Company, under a severe penalty, to appoint two commissioners. The statute says: "The rates to be charged for water must be determined" by these commissioners.

The report was accepted by both the Water Company and the City, and for a period of nine months after it went into effect the City paid the established rates. It continued thereafter to use the water service at all the fires and ordered the Water Company to put in new hydrants, etc.

These facts in themselves would dispense with the necessity of a formal contract and would act as an estoppel against the City under the authorities hereinbefore referred to.

Certain other questions raised by the City at the trial, such as that the notification by the City to the company

to discontinue the extra pressure, would relieve the City from paying the rates thereafter, although it continued to hold the company to the performance of all other conditions imposed by the water commissioners, and continued to use the fire service at all the fires, and the contention that the fact that the Water Company had substituted electrical pumps of greater efficiency than the steam pumps referred to by the water commission in its report would be a violation of the conditions imposed, we deem it unnecessary to discuss, as the charge of the Court to the jury on those points was clearly correct.

In conclusion, we insist that, on the main question involved in this case, both the District Court and the Circuit Court of Appeals, in upholding the constitutionality of Ordinance No. 678, and holding that the rights of the Water Company to use the streets were revocable licenses, disregarded the established principles of law as laid down by this Court and every other State and Federal court in which the question has been decided.

The decision of Judge Gilbert, holding that the ordinance was an impairment of the Water Company's rights, was carefully considered and cites abundant authorities to sustain it, while the decision of the Circuit Court of Appeals stands alone.

The proposition that, merely because no time limit was mentioned in the ordinances to Eastman Brothers and to the Water Company, the property of the present company can be destroyed at the will of the City, is alike obnoxious to the law of the land and to justice and reason.

Nor has the City presented a single reason why such a construction is necessary or advantageous to the City or its inhabitants. The statutes of the State surround the

City with every protection which is necessary or desirable. No exclusive or perpetual franchises for supplying water can be granted, and it has the right to regulate the use of the streets by the company within the limits of its police power. The report of the water commission shows that the rates are very low in comparison with other cities of the same size and that they yield to the company a net return of only six per cent of the actual value of its plant, based upon a low valuation.

The City has granted a franchise to a rival company for fifty years to furnish water within the City, and the construction which has been placed upon the rights of this company serve only to destroy its property and business for the benefit of the rival company, merely because the latter company had a clause inserted in its franchise that it should be in force for fifty years.

The fact that such a construction has been placed upon the rights of the Water Company is, of itself, sufficient to destroy its property without further action on the part of the City, as it is clearly impossible for the company to sell its bonds or obtain credit to make necessary improvements when the City is at liberty at any time to revoke its grants and prevent it from continuing its business. Any judgment which the Water Company might recover against the City for water for fire services or any other purpose would be a nullity, because the City Council could at once pass an ordinance levying a tax for a corresponding or greater amount against the Water Company for the use of the streets.

We submit, therefore, that the decision of the District Court in allowing the amount of the counter-claim of the

City based on ordinance No. 678, and so instructing the jury, and the decision of the Circuit Court of Appeals in upholding that ordinance, were clearly wrong, and that the decision of Judge Gilbert declaring that ordinance unconstitutional was the correct expression of the law governing these cases.

Respectfully submitted,

RICHARD H. JOHNSON,

Attorney for Plaintiff in Error in Nos. 313 *and* 573, *and for Defendant in Error in No.* 639.

RICHARD Z. JOHNSON,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1912

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plaintiff in Error.

vs.

BOISE CITY, Defendant in Error.

No. 313

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT.

No. 313 is an action at law brought by Boise City, the defendant in error, against the Boise Artesian Hot & Cold Water Company, Limited, a corporation, the plaintiff in error, to recover the sum of $10,130.00, alleged to be due the City as a license charge for the use and occupancy of its streets and alleys by the plaintiff in error in laying and maintaining its water works therein from June 7, 1906, until April 1, 1909. The cause was originally instituted in the District Court of the Third Judicial District of Idaho, and upon the petition of the plaintiff in error removed for trial to the United States Circuit Court for the District of Idaho. Upon the pleadings and a stipulation of facts the case was submitted to the Circuit Court for the Dis-

trict of Idaho and a judgment was entered in favor of the plaintiff in error. Upon writ of error the cause was heard in the Circuit Court of Appeals, for the Ninth Circuit, and the judgment reversed. The plaintiff in error now seeks a review in this Court of the decision of the Court of Appeals.

As the statement of the case set forth in the brief of plaintiff in error does not present fully a statement of the questions involved and the facts disclosed by the record, the defendant in error deems it necessary, in order to present the propositions in controversy, to relate more fully the facts disclosed by the record.

It appears by the amended complaint that the defendant in error, Boise City, is a municipal corporation within Ada County, Idaho, and that the plaintiff in error, the Water Company, is a private corporation, organized and existing under the laws of the State of West Virginia; that on the 3rd day of October, 1889, the City by an ordinance granted to H. B. Eastman and B. M. Eastman, the predecessors in interest of the plaintiff in error, in and to their water works, a license for an indefinite period to lay and repair water pipes in the streets and alleys of said City through which water is now and at the time therein stated was furnished to the City and its inhabitants for profit. That the City on June 7, 1906, enacted and approved an ordinance requiring the plaintiff in error to pay the City on the 1st day of each month a monthly license of $300.00 for the use and occupancy of the streets and alleys of said City by the plaintiff in error in the sale and delivery of water to the City and its inhabitants, and for the privilege granted by said ordinance of October 3, 1889;

that demand has been made upon the plaintiff in error for the payment of said monthly license, but payment has been refused; that the plaintiff in error and its predecessors in interest in and to said water works system have never at any time paid to the City any compensation for the use and occupancy of said streets and alleys when in operating its said water works system (Record, p. 1-5).

The plaintiff in error answered the City's complaint and admitted all the allegations thereof except as to the ordinance of October 3, 1889, being a license for an indefinite period, or that it was indebted to the City in any sum by reason of the enactment of the ordinance of June 7, 1906, for the use of the streets and alleys referred to in the complaint. And for a further answer it alleged that on July 10, 1890, the Mayor and Council of the City enacted an ordinance granting to the Artesian Water and Land Improvement Company, a corporation, and its successors and assigns, the privilege of laying down and maintaining water pipes in the streets and alleys to the City; that said corporation accepted said ordinance and proceeded to sink artesian wells, construct reservoirs, and lay pipes along the streets and alleys of the City and to supply the City and its inhabitants with water; that H. B. Eastman and B. M. Eastman accepted the ordinance of October 3, 1889, and constructed a water system plant and laid their water mains and pipes over and along the streets and alleys of said City; that on March 28, 1891, the Artesian Hot & Cold Water Company, Limited, became the owner by purchase of the rights of the said Eastman Brothers and of the Artesian Water and Land Improvement Company in and to said water works system and since said date have sup-

plied water to the City and its inhabitants; that on August 28, 1901, the plaintiff in error became the owner by purchase of the entire water works system and plant of the Artesian Hot & Cold Water Company, and since said date has supplied the City, a city of over 25,000 population, and its inhabitants, with water; that the City and its Mayor and Council have claimed and are still claiming that the plaintiff in error is a mere licensee under a license which may be revoked or annulled at the will of the City, and the plaintiff in error avers that said ordinances, when accepted and acted upon by it and its grantors' became and are franchises and binding contracts between the City and plaintiff in error; that the plaintiff in error during the whole time of its engagement in the business of supplying water has paid its due proportion of taxes, state, county, city, and school taxes upon all its property in said city, and has charged and received water rates in accordance with the rate duly established by commissioners appointed under Section 2711 of the Revised Statutes of Idaho and the Act of March 9, 1905, both being now embraced in Section 2839 of the Idaho Revised Codes. That the Capital Water Company, a corporation organized under the laws of Idaho, is now engaged in the business of supplying water to the city and its inhabitants under ordinances granted by the City and the laws of the State of Idaho, but said company is not required to pay any license or taxes for the privilege of using said streets (Record p. 11-18).

The City demurred to and moved to strike out all that portion of said answer relating to a further answer stated above for the reason that the facts therein alleged do not

constitute a defense to the cause of action set forth in the complaint (Record p. 18-20).

Upon the hearing the trial Court overruled the demurrer and allowed said motion as to paragraphs 8 and 14 of the answer, and disallowed the remainder thereof (Record p. 31). Thereafter the cause was submitted to the Court upon the pleadings and an agreed statement of facts (Record p. 43-46), and upon which the question being raised by objections to the introduction of evidence to establish the affirmative allegations of the plaintiff in error's answer, on the ground that the same are incompetent, irrelevant and immaterial and do not constitute a defense to the city's cause of action. The trial court rendered its decision, in which it held the same as it did upon the demurrer and motion to the effect that the ordinance of July 10, 1890, to the Artesian Water & Land Development Company having been accepted and acted upon by the grantee and its uccessors, created a franchise for fifty years for the reason that Section 2710 of the Revised Statutes of Idaho, 1887, now embraced in Section 2838 of the Idaho Revised Codes, should be read into this ordinance as a part thereof, and that the imposition of the license fee provided for by the ordinance of June 7, 1906, was void and ordered judgment to be entered in favor of the plaintiff in error (Record p. 26-34). It is from this decree that a writ of error was prosecuted in this cause to the United States Circuit Court for the District of Idaho, and the judgment reversed. The plaintiff in error now seeks a review in this Court the decision of the Circuit Court of Appeals for the Ninth Circuit (Record p. 67). This review of said ordinances and the facts disclosed by the record present for consideration the controlling ques-

tion as to whether or not the plaintiff in error has a franchise or contract right to the use of the streets and alleys of Boise City under the ordinances of October 3, 1889, and July 10, 1890, or either of them, for a period of fifty years, or for any definite term. The City contending that it has only granted under said ordinances a mere license, and can require as a further continuation thereof the payment of a license fee for the use of its streets and alleys. ,

ARGUMENT.

THE PLAINTIFF IN ERROR HAS NO FRANCHISE OR CONTRACT RIGHT TO THE USE OF THE STREETS AND ALLEYS OF BOISE CITY AS THE CITY ONLY GRANTED BY THE ORDINANCES OF OCTOBER 3, 1889, AND JULY 10, 1890, A MERE LICENSE, AND CAN REQUIRE AS A FURTHER CONTINUANCE OF SAID LICENSE THE PAYMENT OF A LICENSE FEE FOR THE USE OF ITS STREETS AND ALLEYS.

We presume that it will not be disputed that unless the plaintiff in error has a franchise or contract right with the city or is given an absolute right under the statute for the use of the streets and alleys of the City and is occupying the same for an indefinite period under an ordinance that is a mere license, the City can require as a further continuation of said license and use the payment of compensation.. This is the crucial question in the case.

We further presume that it will not be controverted that before a person or corporation can acquire the right to occupy and use the highways of a city for any length of time such right must be granted by either an Act of the

Legislature or the Mayor and Council of the City. Whatever rights the plaintiff in error has to the use of the streets and alleys of the City must come from the ordinances of October 3, 1889 and July 10, 1890. The ordinance of October 3, 1889, referred to in the complaint, reads as follows:

"Ordinance No. 94.

"An Ordinance Granting to Eastman Brothers the Right to Lay Water Pipes in Boise City.

"The Mayor and Common Council of Boise City, I. T., ordain:

"Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through, along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along or across which they may lay such pipes in as good condition as they shall find the same, and shall at all times promptly repair all damages done by them or their pipes or by water escaping therefrom.

"Sec. 2. This ordinance shall take effect from and after its passage and approval.

"Passed the Council this 3d day of October, 1889.

"Approved. "JAMES A. PINNEY,
"Mayor."

"Attest:

"(Seal) C. S. McConnel, City Clerk." (Record p. 2).

The ordinance of July 10th, 1890, referred to in the answer of the plaintiff in error reads as follows:

"An Ordinance Granting to the Artesian Water and Land Improvement Company, the Right to Lay Water Pipes in Boise City.

"The Mayor and Common Council of Boise City, Idaho, do ordain:

"Section 1. The privilege of laying down and maintaining water-pipes in the streets and alleys now

laid out, or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water and Land Improvement Company, its successors or assigns.

"Section 2. All water-pipes placed in said streets and alleys shall be laid down in workmanlike manner, and all excavations made for pipes shall be properly filled and with all convenient speed.

"Section 3. This ordinance shall take effect and be in force from and after its passage.

"Approved July 10, 1890." (Record p. 18).

It will first be observed from a reading of these ordinances which are relied upon by plaintiff in error as granting to it the right to the use of the streets and alleys of the City, no term was fixed for the duration of the privilege. They do not possess any element of a franchise or contract, but are merely licenses subject to the requirement by the City as a further continuation thereof to the payment of a license fee for the use of the streets and alleys. They certainly do not contract with the plaintiff in error or its predecessors in interest that they can occupy and use the streets and alleys of the City for a definite or fixed period. These two ordinances were either grants of licenses to the use of the streets and alleys and are subject to the right of the City to require the payment of a license fee for a continuation thereof, or, by their acceptance on the part of the grantees, they became perpetual contracts. No middle ground can be taken between these two constructions. There is no provision in either the constitution or laws of Idaho granting authority to the City to grant exclusive or perpetual franchises for the use of its highways. In the absence of such authority the City has no power to grant a perpetual franchise. This is the undoubted rule recognized by modern authority. It is therefore clear under all

the rules of construction that these ordinances, which are similar in terms, simply gave to the predecessors in interest of the plaintiff in error a license and that they went into the City with a full knowledge that they had only a license.

Before entering upon a discussion of this proposition as to whether the plaintiff in error under these ordinances has a franchise or contract right to the use of the highways of Boise City for a period of fifty years, or any number of years, we invoke, in the first place, the general rule that they take nothing in the way of a grant, franchise or contract by intent or implication. They must show by clear and express terms of the grant, franchise or contract that the right or privilege to the use of the streets and alleys is expressly given in said ordinances, for all that is not expressly given is presumed against the company and in favor of the City or state. This rule of law is now elementary.

In the case of *Knoxville Water Company vs. Knoxville,* 200 U. S. 22; 50 L. Ed. 353, this Court said:

> "'Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this court in Turnpike Co. vs. Illinois, 96 U. S. 63, 68. The universal rule in doubtful cases—this Court said in Oregon Railway Co. vs. Oregonian Railway Co. 130 U. S. 1, 26—is that 'the construction shall be against the grantee, and in favor of the Government.' As late as Coosaw Mining Co. vs. South Carolina, 144 U. S. 550, 562, this Court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the

public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. 'This principle', it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' (*Slidel vs. Granjean,* 111 U. S. 412, 439). We have never departed from or modified these principles, but have reaffirmed them in many cases. It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by the words so clear as not to admit of two different or inconsistent meanings."

In the case below the question involved was the validity of a provision against the grant in the charter of a corporation to do certain things. It was said:

"The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. The doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this Court."

Northwestern Fertilizing Co. vs. Hyde Park, 97 U. S. 659; 24 L. Ed. 1036.

This rule has been invoked, of course, a great many times and applied to a multitude of charters, ordinances

and grants, and we simply give a few of the authorities and references, which may be of interest in the further investigation of this subject:

Blair vs. Chicago, 201 U. S. 400, 50 L. Ed. 801.

Slidel vs. Grandjean, 111 U. S. 412; 28 L. Ed. 321.

Coosaw Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.

Pearsall vs. G. N. Ry. Co. 40 L. Ed. 838; 161 U. S. 646.

Phoenix Ins. Co. vs. State, 40 L. Ed. 660; 161 U. S. 174.

Covington vs. Sandford, 41 L. Ed. 560; 164 U. S. 578.

Hogs vs. Railroad Co., 25 L. Ed. 303; 99 U. S. 348.

Bank of Commerce vs. Tenn. 26 L. Ed. 810; 104 U. S. 493.

N. O. Gas Co. vs. Louisiana, 115 U. S. 650.

Syracuse Water Co. vs. City, 116 N. Y. 167.

Birmingham vs. Birmingham, 139 Ala. 531.

The same rule applies with reference to grants upon the part of the City as it does when the same is granted by the Legislature, that is to say, that nothing is to be taken by implication against the public. Therefore, an ordinance in the nature of a grant is to be strictly construed and that which is not expressly given in plain terms is held to be against the grantees and in favor of the City.

Viewing the ordinances of October 3, 1889, and of July 10, 1890, in the light of these decisions, it is clear that they can avail the plaintiff in error nothing in this action in its contention that said ordinances, or either of them,

under the law of the State of Idaho grant a franchise or contract right for a period of fifty years, or for any term, to the use of the streets and alleys of the City, and all that the plaintiff in error has under them is a mere license, subject, as stated above, to a requirement by the City to the payment of a license fee for the continuation of the use of the streets and alleys. We repeat that these ordinances are wholly silent upon the subject of the right of the plaintiff in error to use and occupy the highways of the City for any definite period; they simply give the plaintiff in error the right to *lay and maintain water pipes* in the streets and alleys of the City for no limited time, all other matter relative to the period which the plaintiff in error can continue occupying and using said streets and alleys or the payment of a license or compensation to the city for the use of its streets and alleys are up to future contract and future legislation by the City. These ordinances do not in any way inhibit or contract against future legislation on the part of the City, and whether the privileges under these ordinances were in the hands of the Eastmans or the Artesian Water & Land Improvement Company, or their successors, the corporation, they were subject to such obligations, charges, license and duties as the City might reasonably impose, and the duty herein imposed by ordinance of June 7, 1906, is one which the courts have held proper and reasonable under the conditions which the plaintiff in error is occupying and using the streets and alleys of the City, there being nothing in the nature of a contract or franchise in the ordinances against the City requiring the payment of the license fee.

What we say is, that when the Water Company, for instance, is organized for the purpose of supplying the in-

habitants of the City with water and entered upon the streets and alleys under these ordinances which failed to contain any element of a contract or franchise exempting it from the payment of a license fee for the use of its said streets and alleys, such corporation organized and conducting its business under such conditions is subject to such requirements as is imposed by said ordinance of June 7, 1906. These ordinances are not contracts which can be enforced in perpetuity by either party. There is no word or clause in them that binds the Company to continue to furnish water under them. They are not mutually enforcible. Their continuance is optional, and if the Company desired not to pay such license fee required by said ordinance of June 7, 1906, as a continuation of the use of the streets and alleys, it could cease using and occupying the same.

It will be conceded, we presume, that the ordinance of July 10, 1890, is not in substance distinguishable from the Eastman's ordinance of October 3, 1889, so far as the express language is concerned. It is therefore clear from a reading of these two ordinances that no franchise or contract right has been granted to the plaintiff in error or its predecessors in interest, and it is necessary for it to look elsewhere in its endeavor to establish a contract or franchise with the City. This question as to whether or not said ordinance of October 3, 1889, granted a franchise or contract to the predecessors in interest of the plaintiff in error was for the first time, in an action at law between the City and the plaintiff in error, decided by the Circuit Court of Appeals for the Ninth Circuit. The Court said:

"The plaintiff in error contends that the statute of 1887 confers upon the City of Boise no right to take water free from it or its predecessors, for the reason that they were protected by the franchise given to the Eastmans. There can be no doubt that the grant of a privilege to lay water pipes and furnish the inhabitants of a municipality with water for a stated period of time, accepted and acted upon by the grantee thereof, is a grant of a franchise given in consideration of the performance of a public service, and is protected against hostile legislation by the State. * * *

But had the Eastmans such a contract with the city as to come within the rule just cited? The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. * * * From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own water works, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

Boise City Artesian Hot and Cold Water Co. vs. Boise City, 123 Fed. 232.

It was insisted in the Circut Court of Appeals, and we presume that it will be here, that Sections 2710 and 2711 of the Revised Statutes of Idaho, 1887, now embraced in

Sections 2838 and 2839 of the Revised Codes of Idaho, were overlooked by the Circuit Court of Appeals when deciding the case last above cited; that the ordinance of July 10, 1890, was not considered by the Court; that where a license is granted, although for an indefinite period and on the faith of which the grantee has made expenditures, the City is estopped from requiring the grantee from paying for the use of its streets and alleys. Under these contentions we are called upon to consider: First, An analysis of the decision in that case for the purpose of ascertaining what were the questions presented to the Court. It will be noticed that the bill of the Water Company in that case disclosed that the City had no right to the use of water free from its pipes for sprinkling purposes, because the ordinance of October 3, 1889, known as the Eastmans' ordinance granted to the Water Company a *franchise*. The answer of the City in that case, among other things, made denial of this allegation, thereby presenting to the Court as one of the questions as to whether or not the Eastmans' ordinance was a grant or a *franchise*. It is evident from a reading of said Sections 2710 and 2711 that the Court did not deem them applicable when in deciding that case, for said Section 2710 does not purport to prescribe what a grant or contract made by the City shall contain as said section is merely a limitation upon the power to contract.

In the case at bar the Circuit Court of Appeals was again called upon to construe not only the Eastmans' ordinance of October 3, 1889, but the ordinance of July 10, 1890, running to the Artesian Water and Land Improvement Company, and the Court took the same view as it did in its former decision and quoted at length a portion thereof, holding that these ordinances granted only a mere

license and left the City free at any time to impose a license fee as a condition of its continued enjoyment and that the most the licensees could claim under them was that it legalized their use of the streets. (Record p. 60-66).

In the case below, one of the questions presented and decided by the Court was whether or not there was a franchise or licenes granted by the City. It appears that the village authorities only permitted the corporation to lay its pipes in the village streets, and the question arose as to whether or not the corporation had a franchise which would preclude the village from constructing a water system of its own without taking by purchase or condemnation the property of the corporation, and the Court held:

> "No canon of construction is familiar to the Court which transforms plain and unambiguous language permitting an act to be done into a positive command to do the act. So far as the written law is concerned there can be little doubt that villages in this State may build and own their own water supply, notwithstanding the fact that private corporations are in the field, provided the village authorities have done nothing more than permit the corporation to lay its pipes in the village streets. In the present instance the village simply granted a naked permission to do this to the water company. It was a license and nothing more."
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> *President, etc. of Colby University vs. Village of Canandaigua*, 96 Fed. 449.

The authorities seem to agree that where no period of time is fixed by the instrument for its duration which is claimed to be a contract, the same is not binding upon either party thereto and is subject to the payment of reasonable compensation thereunder for the use of the property therein referred to.

"If no time is fixed by the contract for its duration and the contract from its nature is one which might last indefinitely either party may at its option terminate such a contract."

Page on Contracts, Vol. 3, p. 2110.

Western Union Tel. Co. vs. Pennsylvania Co. 125 Fed. 67.

Jones vs. Newport News, 65 Fed. 736.

We find that the Supreme Court of the United States, in the case below laid down the rule for which we are contending in this case. The question before the Court was as to the right and power of the city of St. Louis to charge the Western Union Telegraph Company for the use and occupancy of its streets and alleys. There were no contractual rights existing between the city and the Telegraph Company. The company contended that it had the right to the use of the streets of the city under an Act of Congress and a general ordinance of the city permitting it to use the streets. The city, after the company had constructed its poles, adopted an ordinance requiring the company to pay it a certain sum for the use of its said streets and alleys. The company refused to pay the amount claimed by the city, so suit was instituted in the state court by the city against the company for the recovery of $22,635.00, for three year's use of its streets. The case was removed to the Federal Court upon application of the company and the Court finally sustained the right of the city to charge for the use of its streets and alleys. We invite the Court's attention to this decision, as we think it settles the question as to the right of the City to charge for the use of its streets where no contract exists

and where the Company is merely occupying the streets under an ordinance granting it permission to do so.

City of St. Louis vs. Western Union Telegraph Co.
148 U. S. 92; 37 L. Ed. 380.

The Supreme Court of Ohio, in the case below,, was called upon to interpret an ordinance similar to the ordinances of October 3, 1889, and July 10, 1890, involved in this case, wherein the City of Akron brought an action to restrain the East Ohio Gas Company from discontinuing furnishing gas to its customers. It appears that the Gas Company applied to the city for its consent to enter the city and lay down its mains and pipes in the streets, alleys and public grounds and connect with surface pipes to the public buildings, street lamps and private consumers. Consent therefore was given to the Company by an ordinance of the city enacted on the 26th day of September, 1896, which was accepted by the Company, who thereafter entered the City and laid its mains and pipes in the streets and alleys and furnished gas to the public. The ordinance was entirely silent as to the length of time during which the Company might exercise the privilege thus granted and there was a condition in the ordinance that for the first ten years the Company should not charge over a certain amount for gas and that the City should not during said ten years pass any ordinance fixing the rates at which gas should be supplied at any lower price than that set forth in the ordinance. After the expiration of said ten years the City then adopted another ordinance fixing the price of gas to be furnished by the Company at a lower rate than in the first ordinance. The Company declined to accept the terms established in the second or-

dinance and signified its intention to discontinue its business in the City and withdraw therefrom. The chief question decided in the case was the same as the one in controversy in the case at bar. The Court said when in reversing the case and dissolving the injunction entered against the Company:

> "Whether a contract for the privilege of entering the streets of the City was necessary to the plaintiff in error, or whether the defendant in error was competent to make it, is immaterial in this case. The consent of the City for that purpose was granted by the ordinance, and it was accepted by the gas company; but no stipulation was made and accepted as to the time when the use of the streets for the purposes of the gas company should end. The language of the ordinance is: "That the East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, * * * to maintain, operate, repair and remove mains and pipes * * * together with the right to construct and maintain ,repair and remove all necessary regulators,' etc. Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But, if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant

in error, on more mature reflection, would not insist upon such a conclusion. * * *

"It comes, then, to this: That, in the absence of limitations as to time, the termination of the franchise is indefinite, and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto. Or, to state it concretely, the contract being silent as to the duration of the franchise and the 10-year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price, and the gas company may accept or reject these. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city; but, on the other hand, there being no provision to that effect in the original contract, the city cannot directly or indirectly deprive the gas company of its property without due process of law when the latter withdraws from the further exercise of its franchise."

East Ohio Gas Co. vs. City of Akron, 90 N. E. 40-42.

City of New Orleans vs. New Orleans T. & L. R. Co. 4 So. (La. Ann.) 512.

THAT SECTION 2710 OF THE REVISED STATUTES OF IDAHO, 1887, NOW EMBRACED IN SECTION 2838 OF THE IDAHO REVISED CODES, RELIED UPON BY THE PLAINTIFF IN ERROR, DOES NOT OPERATE TO EXTEND THE PRIVILEGE AND LICENSE REFERRED TO IN SAID ORDINANCE OF OCTOBER 3, 1889, AND JULY 10, 1890, FOR 50 YEARS, OR ANY DEFINITE PERIOD AS SAID STATUTE IS MERELY A LIMITATION UPON THE POWER TO CONTRACT AND NOT A PROVISION OF THE CONTRACT.

We understand that the plaintiff in error's main contention is that while the ordinance of July 10, 1890, is

not in substance distinguishable from the ordinance of October 3, 1889, so far as the express language is concerned, still, in as much as said ordinance of July 10, 1890, runs to a corporation, the Court in construing it should read into it a clause providing that the privilege granted shall continue for fifty years, because of Section 2710 of the Revised Statutes of Idaho, which reads as follows:

> "No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

Under the charter of Boise City the Legislature of Idaho has granted to it full control of its streets and alleys. We quote the portions of the charter of the City with reference to this authority:

> "The Mayor and common council shall have full power and authority within Boise City * * * to provide the city with good and wholesome water, and for the erection and construction of such water works and reservoirs within or without the limits of the city as may be necessary or convenient therefor,"

(Subdivision 9 of Section 5). And further:

> "The roads, streets and alleys within said city limits shall be under the exclusive control of said common council, who shall make all needful rules in relation to the improvement, repair, grading, cleaning, etc., of the same, and said city shall not be included in any road district in said county." (Sec. 10. Approved January 11, 1866).

It is further provided in Section 32 of said Charter:

"To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers, and the erection of electric, gas and other lines."

It will be observed from a reading of the above provisions of the special charter of Boise City that the Legislature has granted to the City full authority and control of its streets and alleys, with power to give or refuse consent to the occupation and use of its streets for any purpose. Then we invoke the admitted rule, recognized by the courts generally, that where a municipality has power to give or refuse consent to the occupation and use of its streets for any purposes, it may impose terms and conditions including a time limit; and an acceptance of a grant carries with it all the conditions and limitations upon which it is based.

Chicago Terminal Transfer R. Co. vs. Chicago, 203 Ill. 576; 68 N. E. 99.

Detroit vs. Ft. Wayne & B. I. Co. 95 Mich. 456; 54 N. W. 958.

Alleghany vs. Millville E. & S. R. Co. 159 Pa. 411; 28 Atl. 202.

City of Indianapolis vs. Consumers' Gas Trust Co. 140 Ind. 107; 39 N. E. 433.

The principle which we are contending for as to the power of the City to limit the tenure of a grant or privilege to occupy its streets is clearly recognized in the case below when in construing the statute in limiting the City to a period of twenty years in granting a privilege to the use of its streets. The Court said:

"The city being the source of the grant, not merely a consentor to it, the terms and duration of the grant

to that end were prerogatives of the city, delegated by the State, and the gas company was powerless, equally with any individual to exact terms or privileges. It could accept or refuse such terms as were tendered. * * * Thus, in fixing by this ordinance the tenure during which the grantee was permitted to occupy the streets with its pipes and serve the inhabitants with natural gas, it was within the power of the city to limit the tenure, either to a definite number of years, or to terminate after a given period at the option of the city, as was in effect provided by Section 18."

In the concurring opinion of Judge Grosscup it is said:

"The sole right of the company to enter upon the streets of Indianapolis, was under a grant from the City of Indianapolis. Under the laws of Indiana, the city is not simply a consentor—the city is the source of the grant; and being the source of the grant has the right to impose upon the grant, as to tenure, as well as to other terms and conditions, just such limitations as it deemed wise."

City of Indianapolis vs. Consumers' Gas Trust Co. 144 Fed. 640-44-48.

Sullivan vs. Bailey, (Mich.), 83 N. W. 996.

City of Houston vs. Houston City Street Ry. Co. 18 S. W. 127.

Thus it will be seen from the above provisions of the special charter of Boise City full power and authority is granted by the Legislature to it to provide the City with good and wholesome water. Therefore, the City is the source of any grant, privilege or franchise, and being the source of such grants, privileges and franchises we look to the provisions of its special charter in determining what period of time a right is granted when in considering or-

dinances like the ones in question. One thing must be conceded and that is the sections of the statute here referred to are general in their application and relate solely to the power, duties and obligations of water companies formed for the purposes mentioned therein, and have no reference whatever to the powers and duties of cities organized either under a general or special law (if apply at all) other than a limitation of the life of a franchise or a contract made by the city.

In other words, in the absence of language in the ordinance defining the term, this statute operates to extend the grant for a maximum period, which could have been legally specified. Although the plaintiff in error contends that this ordinance is silent as to the term, yet this Court should read into it this provision of the statute, and by so doing make that which was a license an irrevocable franchise. It is evident from an analysis of this statute, relied upon by the plaintiff in error, that no provision will be found in it purporting to define or prescribe what the contract or grant shall contain, but what it shall not contain. It does not operate to extend the privilege and license referred to in said ordinances for fifty years, or any definite period as the statute is a limitation upon the power to contract and not a provision of the contract. It does not define what the terms of the grant will be, but is in the nature of a prohibition. It does not say that the grant shall be fifty years, as it simply says that it shall not be beyond that period. It is clear to the mind that said Section 2710 does not apply or extend the period of time to fifty years in which the Water Company can occupy and use the streets and alleys of the City, but if it applies at all, it only provides a limitation upon the City

authorities when in contracting with the Water Company, as this statute reads: *"No contract or grant must be made for a term exceeding fifty years."* It certainly cannot be contended that the Water Company could enter upon and use the streets and alleys of the City without first obtaining a franchise or contract from the City under this provision of our statute, then, if that be true, the City has the undoubted right, when in granting such franchise or contract, to prescribe the period of time or limit the life of such franchise or contract, and when in doing so this statute merely places a limitation upon the power given to the council of the City when in granting such franchise or contract.

The Circuit Court of Appeals construed said Section 2710 of the Idaho Statutes, and after referring to the statute said:

> "We are unable to give this statute the effect attributed to it by the Court below. Its terms and purposes, we think, seem quite plain. Every corporation formed to supply any city or town of the State with water is thereby prohibited from doing so unless previously authorized by an ordinance of the authorities thereof, or unless done in conformity with a contract entered into between such city or town and the corporation. Such contracts are authorized by the statute, subject to the express provision that they shall not take from the city or town the right to regulate the rates for water, nor, further expressly declares the statute, shall any exclusive right be granted, nor shall any such contract or grant be made for a term exceeding fifty years.
>
> "This is very far from saying that no such contract or grant shall be made for a shorter period than fifty years. It fixes a maximum beyond which no contract or grant is permitted to extend, but leaves the matter of time, within that limit, to be fixed by contract or by grant of the municipality." (Record p. 63-64).

In the case below the Court had before it the consideration of a statute of the State of Ohio, which provided:

> "That no grant nor renewal of any grant for the construction or operation of any street railroad, shall be valid for a greater period than twenty-five years from the date of such grant or renewal." The Court said: "The general law gives authority to the council to consent to the use of the city's streets by street railroads, and, as we have seen, it was not until 1878 that a proviso was added to the effect that no grant or renewal (that is to say, no grant or renewal under Sections 2501 and 2502) should be valid for more than 25 years. This proviso is a limitation upon the plenary power theretofore given by the state to the council, and no more is to be subtracted, in consequence of that proviso, from that plenary power thus delegated, than its express terms permit."
>
> *Cleveland Electric R. Co. vs. City of Cleveland*, 137 Fed. 111-129.

Counsel for the plaintiff in error on pages 26 and 27 of his brief calls attention to part of Section 2840 of the Revised Codes of Idaho and contends that the Water Company was given a right thereunder to use the streets and alleys of the City subject only to reasonable rules and directions of the City. It will be necessary to consider the entire section, together with said Section 2838, heretofore cited and which is in the same title as said Section 2840. After considering these two sections together it will be observed that the Legislature provided in said Section 2838 that no corporation can supply any City with water unless previously authorized by an ordinance or contract. This does not grant to the Water Company the right to enter upon and use the streets unless it was first authorized by the City. Said Section 2840 only grants the right to the

use of the streets when a corporation is going through the City to connect its pipes with those laid in highways outside of the City limits, and not where the corporation is attempting to use the streets of the City for the purpose of furnishing water to the City and its inhabitants.

Counsel for the Water Company contends at page 27 of plaintiff in error's brief that the life of the alleged grant to the Artesian Water & Land Improvement Company of date July 10th, 1890, extends to July 10th, 1940, a period of fifty years, the life of said company. There is absolutely nothing in the record showing what the period of the corporate existence of the Artesian Water & Land Improvement Company was. The period of its corporate existence is not pleaded and there is nothing in the stipulation of facts going to show for what period said company exists. Indeed, so far as the record in this case is concerned, the corporate existence of the Artesian Water & Land Improvement Company may have expired years ago.

While there are cases that hold that, where the exact term of the grant is not fixed in the ordinance, it shall be construed to mean that it shall continue for a period of the corporate existence of the company to which the grant is made, such cases, however, are not authority in this case for the reason that said Section 2838 of the Idaho Revised Codes provides, among other things, "That no contract or grant must be made for a period exceeding fifty years." From this statute it will be seen that there is a limitation upon the period for which a grant can be made, to wit, 50 years. In this case it must be conceded that the grant must be construed most favorably to the defendant in error, Boise City. This being true, a court would have no more right to read into the ordinance the period of the

corporate existence of the Artesian Water & Land Improvement Company, or the extreme period of fifty years, than it would have the right to read into it a period of five, ten, or twenty years. The term of grant not having been fixed it must be concluded that it is revocable at the will of the City.

THE MERE FACT THAT THE WATER COMPANY HAS MADE EXPENDITURES IN THE ENLARGEMENT OF ITS SYSTEM AND IS FURNISHING WATER TO THE CITY AND ITS INHABITANTS FOR PROFIT IN ACCORDANCE WITH THE RATES FIXED BY A COMMISSION AND IS PAYING THE TAXES LEVIED UPON ITS PROPERTY UNDER THE GENERAL LAWS OF THE STATE, OR BECAUSE THE CAPITAL WATER COMPANY, WHO HAS A CONTRACT WITH THE CITY FOR A FIXED PERIOD IS NOT REQUIRED TO PAY A LICENSE FEE, DO NOT BECOME A PART OF OR TO BE READ INTO SAID ORDINANCES OF OCTOBER 3, 1889, AND JULY 10, 1890, OR ESTOPS THE CITY IN THE ABSENCE OF A FRANCHISE OR CONTRACT FROM REQUIRING THE WATER COMPANY TO PAY COMPENSATION FOR THE USE OF ITS STREETS, AS THESE MATTERS ARE EQUITABLE DEFENSES AND CAN NOT BE INTERPOSED IN AN ACTION AT LAW IN THE FEDERAL COURTS.

This is an action at law, but the Water Company in its answer seeks to establish an equitable defense to the action. The allegations of the Water Company's answer to the effect that it has expended large sums of money on the faith of the ordinances, referred to, that the City has

acquiesced in the use of its streets, that its property has been assessed for state, county, city and school taxes, and in the same manner as other property, and that it has each and every year paid to the proper tax collector the amount of all taxes assessed against its property and that the City has granted to another water company, known as the Capital Water Company, a franchise for the purpose of supplying the City and its inhabitants with water, and that the Capital Water Company is now, and for a long time past has been, engaged in the business of supplying water to the City and its inhabitants and using and occupying the City's streets and alleys for such purposes without being required to pay the City any license or tax whatever for such privilege, and that there are numerous other individuals, associations and corporations using the City's streets and alleys for the purposes of supplying the City and its inhabitants with electric lights, gas, street railways, telegraph and telephone purposes, without being required to pay the City any license or tax whatever, are purely matters of equitable consideration and can not be plead in an action at law in the Federal Courts as a defense.

It will be noticed from the Water Company's answer that its predecessor in interest voluntarily went to the City and asked for the privilege and license granted by said ordinances, and that the City only, by the terms thereof, granted permission to lay water pipes in its streets and alleys for an indefinite period. There was no contract made between them, nor has the Water Company or its predecessors in interest ever at any time paid the City in any way for the use of its streets and alleys, which they have been using free of charge for a long time, and have and

now claim the right to compensation for water furnished to the City for certain municipal purposes. It makes the request that it should receive compensation for the water furnished to the City and at the same time be permitted to use the streets and alleys free of charge.

This plea of the Water Company that if it is required to pay for the use of the streets and alleys of the city under said ordinance of June 7, 1906, would bring hardship to it, although it appears to be furnishing water at a profit to the inhabitants of a city of 25,000 and also charging the City for water, is sufficiently answered in the cases cited below, in which the correct doctrine is stated that, "But such considerations can not control the determination of the rights of the parties."

Hamilton Gas & Coke Co. vs. City of Hamilton, 146 U. S. 258; 36 L. Ed. 963-8.

Knoxville Water Co. vs. Knoxville, 200 U. S. 22; 50 50 L. Ed. 353.

Curtis vs. Whitney, 13 Wall. 68-72; 20 L. Ed. 513.

President, etc. of Colby University vs. Village of Canandiagua, supra.

An equitable defense in an action at law can not be interposed in the Federal Courts.

It is a well established rule that the defendant in an action at law in the Federal Courts cannot set up a defense that is an equitable one.

Miss Mills vs. Cohn, 150 U. S. 202; 37 L. Ed. 1052.

Northern Pac. R. R. Co. vs. Paine, 119 U. S. 561; 30 L. Ed. 513.

Scott vs. Armstrong, 146 U. S. 499; 36 L. Ed. 1059.

Gravenberg vs. Law, 100 Fed. 1.

"It is obvious and always has been held that a United States Circuit Court can not in the trial of an action at law exercise the powers of a court of equity."

Security Trust Company vs. Black River Nat. Bank, 187 U. S. 211; 47 L. Ed. 147.

If the City is now estopped from requiring the Water Company to pay it reasonable compensation for the continued use of its streets, then we inquire for how long a period of time does it run under the ordinance of July 10, 1890. If the contention of counsel be correct that the rule of estopple applies, then it would continue for an indefinite period for the reason that there is no limit of time provided in the ordinance, and to assert such a right counsel is forced to the contention that the Water Company has a perpetual franchise under said ordinance. This doctrine is not accepted by modern authority unless there is a constitutional provision authorizing the Legislature or city council to grant a perpetual franchise.

THE EVIDENCE FAILS TO DISCLOSE THAT THE WATER COMPANY OR ITS PREDECESSORS IN INTEREST EVER ASKED PERMISSION FROM THE CITY TO ASSIGN OR TRANSFER TO THE WATER COMPANY, A FOREIGN CORPORATION, ANY PRIVILEGE OR LICENSE GRANTED BY SAID ORDINANCES.

We contend that neither the Artesian Water and Land and Improvement Company or the Artesian Hot and Cold Water Company of Idaho, being mere creatures of the law, had authority without consent of the City to transfer any privilege or license they may have had to the Water Company, a West Virginia corporation, and thus authorize a stranger to the City to come into the

City and exercise this privilege or license; that the Water Company has not plead sufficient facts to enable it to exercise this privilege or license. It having failed, as heretofore stated in this brief, to disclose by its answer and the evidence any contract, and that its pretended purchase of the Idaho Company's privilege and license was void.

Pullman Co. vs. Transportation Co. 139 U. S. 1; 35 L. Ed. 55.

Thomas vs. West Jersey R. R. Co. 101 U. S. 71; 25 L. Ed. 951.

Penn. Ry. Co. vs. St. Louis Ry. Co. 118 U. S. 290; 30 L. Ed. 83.

Snell vs. City of Chhicago, 152 U. S. 191; 38 L. Ed. 408.

O. R. N. Co. vs. O. R. Co. 130 U. S. 1; 32 L. Ed. 837.

Gibbs vs. Gas Co. 130 U. S. 396; 32 L. Ed. 979.

The authorities relied upon by the Water Company concerning the questions involved in this case are clearly distinguishable upon the facts, as it will be noticed that they are cases where the courts had before them the consideration of contracts and ordinances possessing all the elements of a contract for a definite period of time. Our attention has been expressly called to *the Walla Walla Case*, 177 U. S. 1, and other cases cited in the United States Supreme Court Reports, by the Water Company as settling the question of it having a franchise. The Court will discover upon examination of nearly all these cases that there were express agreements on the part of the cities to either not build water works of its own during a specified period of time or there were definite periods of time as to

the right of the Water Company to use the streets of the City specified in the ordinances. No such ordinance or question was presented in those cases relied upon by the Water Company as in the case at bar.

In presenting the questions in this case we have endeavored to draw the distinction recognized by the authorities between a corporation having an express contract or franchise for a definite period of time and possessing all the elements of the contract with the municipality for the use of its streets, and a corporation having merely permission to lay pipes in the streets for an indefinite time, which is a license subject to the payment to the City of compensation for a continuation of the privilege thereby granted.

It is manifest that there is a clear distinction in this regard and also between grants conferred directly by the Legislature and those that come from local authorities of the municipality.

Supreme Court of the United States

OCTOBER TERM, 1912

THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Plaintiff in Error.

vs.

BOISE CITY, Defendant in Error.

No. 573

BRIEF OF DEFFNDANT IN ERROR.

In Error to the District Court of the United States, for the District of Idaho.

STATEMENT.

The nature of this action and the questions involved are stated on pages three to six inclusive of the brief of plaintiff in error. As there shown it is instituted by the plaintiff in error to collect from the City the amount claimed to be due for use by the City of water for fire purposes. The City interposed as a counter-claim its demand for installments of the license fee or rental involved in No. 313 accruing subsequent to the period covered by that suit. This demand, so far as it related to installments accruing prior to the commencement of the action, was allowed by the District Judge following the decision of the Circuit Court of Appeals in No. 313 sustaining the validity of the ordinance imposing such license fee or rental, and to review the ac-

tion of the District Judge in this respect the plaintiff in error prosecutes its writ. It will be seen that the case involves the identical question involved in No. 313 and is so treated by the plaintiff in error in its brief; and it will be unnecessary for us to add anything to what we have heretofore said in our brief on this point.

Supreme Court of the United States

OCTOBER TERM, 1912

BOISE CITY, Plaintiff in Error,
vs.
THE BOISE ARTESIAN HOT & COLD WATER COMPANY, Limited, Defendant in Error. } **No. 639**

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the District Court of the United States, for the District of Idaho.

This is a cross-writ of error prosecuted by Boise City to review on different grounds the judgment of the District Court for the District of Idaho complained of by the Boise Artesian Hot and Cold Water Company in No. 573. The cross-writ is brought directly to this Court under authority of *Field vs. Barber Asphalt Company*, 194 U. S. 618, 48 L. Ed. 1142. In addition, however, to the question primarily involved in the cross-writ of error, and therefore as an additional ground of jurisdiction of this Court, a constitutional question is involved subsidiary to the questions involved in Nos. 313 and 573, which make it necessary that this cause should be considered and disposed of with the others.

The facts necessary to an understanding of this cause are as follows:

As said before in the statement under No. 573, this action was commenced by the Water Company to recover water bills from the City, the rates for the services being claimed to have been fixed by a commission under Idaho Revised Codes, Section 2839. The City defended on constitutional grounds, and also on the ground that there was no contract for water supply between it and the Company, and also set up a counter-claim, as stated in No. 573, for the license fees or rentals accruing subsequent to the filing of No. 313.

From 1887 to 1905, Idaho Revised Statutes, Section 2711, was in force and provided:

> "Section 2711. All corporations formed to supply water to cities or towns must furnish pure, fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of person, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity, free of charge. The rates to be charged for water must be determined by commissioners to be selected as follows: Two by the city or town authorities, or when there are no city or town authorities, by the Board of Commissioners of the county, and two by the water company; and in case a majority cannot agree to the valuation, the four commissioners must choose a fifth commissioner; if they cannot agree upon a fifth, then the Probate Judge of the County must appoint such fifth person. The decision of the majority of the commissioners must determine the rates to be charged for water for one year, and until new rates are established. The Board of County Commissioners or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the Territory."

This Act was amended in 1905 by Idaho Laws 1905, page 192, Section 1, to read as follows:

> "Section 2711. All corporations supplying water to towns and cities, must furnish pure, fresh and healthful water to the inhabitants thereof for family use and domestic purposes so long as its supply permits, without distinction of person, upon proper demand therefor, under such reasonable rules and regulations as the company or corporation may, from time to time, establish; and must also furnish water to the extent of its means in case of fire or other great necessity, said water to be furnished as above specified at reasonable rates to be established as hereinafter specified.
>
> "The rates to be charged for water must be determined by commissioners to be selected as follows: Two, by the city or town authorities, or when there are no city or town authorities, then by the Board of County Commissioners of the county, the two said commissioners so selected to be taxpayers of such town or city; two other commissioners shall be selected by the water company or corporation; and in case a majority of the four commissioners so selected can not agree as to the rates to be fixed, they must select a fifth commissioner, who must also be a taxpayer, and if they can not agree upon a fifth commissioner, then the Probate Judge of the county must select a fifth commissioner, qualified as aforesaid; the decision of a majority of the commissioners thus selected must fix and determine the rates to be charged for water for all the uses and purposes heretofore specified, and for the ensuing three years from the date of such decision, and until new rates are established as herein provided."

A later amendment was made by Idaho Laws 1907, page 555, Section 1, but that is not material in this action.

It will be observed that the Section, as it stood in the Revised Statutes of 1887, required water companies to "furnish water to the extent of their means in case of fire or other great necessity, free of charge."

By the Act of 1905, this requirement was omitted and water companies were entitled to reasonable rates, to be prescribed by the commission for that purpose, as well as for others.

This free water requirement was in force in 1889, when the Eastman ordinance was granted (Record p. 19), and in 1890 when the Artesian Water and Land Improvement Company ordinance was granted (Record p. 20), under which ordinances the defendant in error claims that it has a franchise in the nature of a contract with the City for the use of its streets, and the said defendant in error, Boise Artesian Hot and Cold Water Company, Limited, successor in interest of the Eastmans, and the Artesian Water and Land Improvement Company, acquired only such title or contract as their predecessors had.

Shortly after the passage of the amendatory Act of 1905, Boise City and the Water Company, acting under such Act, joined in appointing a commission for the establishment of water rates. Such commission made an exhaustive report, which is set out at length at pages 24 to 29 of the transcript, and which was submitted to the Mayor and Council on July 29, 1905. The only portions of this report which are material are the items on page 25:

> "Fire hydrants. $3000 per annum for fire hydrants now in use and $3.50 monthly for each additional hydrant hereafter established under conditions in supplementary report. Any other municipal or city use to be by meter rate."

The supplementary report referred to was submitted by the commission to the Mayor and Council at the same time, and in it the measure of services to be rendered by the Water Company was specifically defined, and it was

provided that, "In prescribing the above conditions the commission has intended to fix a rate for the best service which can be obtained from the present water system, and in case that service is not rendered and the standard here fixed maintained, no payment shall be made." Other conditions of the report related particularly to the pressure which was to be maintained by the Company. This supplementary report is set out as Exhibit "A" on pages 5 and 6 of the transcript.

The ordinance or resolution or other action of the Council appointing this commission appear nowhere in the record, and there is no evidence in the record of any action by the Council approving or adopting the commission's report or agreeing to be bound by it, or recognizing it in any way. The next official action taken by the City is found in the defensive testimony on page 67 of the transcript, as follows:

> Mr. MacLane: "It is stipulated by and between counsel for the plaintiff and defendant respectively that this book, which defendant's counsel holds in his hands is the journal or minute book of the proceedings of the Council of Boise City, and that the following appears in said minutes. In the proceedings of May 10, 1906: 'Roll call, on motion of Davis that the Clerk be instructed to notify the Boise Artesian Hot and Cold Water Company to discontinue the extra pressure maintained for fire purposes, as the city would pay no further bills for this service from this date, resulted as follows: Ayes, Annett, Davis, Johnson, Koelsch, McLain, Mickel, Schriver, Sinsel, Yoemans; Noes, Davidson. Absent, Byron, Hubbard. A majority voting in the affirmative the motion was declared carried.' The minutes are approved: 'James A. Pinney, Mayor. Attest E. L. Savidge, City Clerk.' That pursuant to such motion, the City Clerk notified the plaintiff Company of such motion. Is that correct.

"Mr. Johnson: Yes.

"Mr. MacLane: That in the minutes of May 17, 1906, the following minute appears in the records of the City Council: 'The communication from the Artesian Hot & Cold Water Company was read, stating that they should continue to furnish the additional pressure of water for fire purposes. On motion, this communication was referred to the City Attorney. Minutes approved, James A. Pinney, Mayor. Attest, E. L. Savidge, City Clerk.' That no further action has been taken by the City Council in this matter subsequent to this date."

Section 2838 of the Revised Codes of Idaho, which is the same as Section 2710 of the Revised Statutes of 1887 and immediately precedes in the Revised Statutes, as it does in the present Codes, Section 2711 of the former which required water to be furnished free for fire purposes, and which has been in force from 1887 to this date, and therefore during all the time covered by any of the proceedings taken in this matter provides:

"Section 2838. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts, so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

The charter of Boise City in force in 1905 at the time of the appointment of the water commission (Laws 1899, page 310, entitled: "An Act amending the Charter of the City of Boise," etc.), enumerates and prescribes the manner of exercise of the corporate powers of Boise City and is so far as material as follows:

"The Mayor and Common Council shall have full power and authority within Boise City.

"Ninth To provide the City with good and wholesome water by contract, or otherwise, and for the erection and construction of such water works and reservoirs within or without the limits of the City as may be necessary or convenient therefor.

"Twelfth. To provide for the prevention and extinguishment of fires and preservation of property thereby; * * *

"Thirtieth. * * * The powers and authority conferred by this section may be enforced or exercised by ordinances, unless otherwise expressly provided. * * *"

The principal questions raised in this brief on this record are:

First. Whether or not the Water Company, the defendant in error, was, prior to 1905, under contract to supply the City with free water for fire purposes, which contract could not be impaired by the amendatory act of 1905, and,

Second. Whether or not the City could in any event become obligated to pay for water except pursuant to previous existing ordinance or contract.

Various other largely technical questions, as to whether or not the Water Company had complied with the requirements of the commissioners' report, and questions of evidence and procedure, were raised in the lower court, but it has been decided to abandon those questions here, and to present the case only on the basic questions involved, and which it is of interest to the City and the Company to have finally determined.

The specifications of error necessary to raise the questions are as follows:

SPECIFICATIONS OF ERRORS.

I.

The Court erred in overruling defendant's objection to the introduction of any evidence under the complaint based upon the ground that the complaint failed to state a cause of action, all of which is shown in defendant's exception No. 1, to the rulings upon the trial. (Assignment No. III, Record p. 75).

II.

The Court erred in denying defendant's motion for nonsuit, made when the plaintiff rested on each and every ground stated in said motion, all of which is shown in defendant's exception No. 9, taken to the rulings upon the trial. Said exception being as follows:

> "If the Court please, comes now the defendant, the plaintiff having rested, and moves this Court for an order of non-suit and judgment dismissing the complaint of the plaintiff herein, on the following grounds, to wit:
>
> "1. That the evidence on behalf of the plaintiff shows that ordinances granted to the predecessor in interest and title of plaintiff and under which the plaintiff is maintaining its water system in the streets of the defendant city were passed and accepted by the plaintiff's predecessors in interest, and assigned to the plaintiff at a time when the Revised Statutes of Idaho, 1887, Section 2711, was in force, and by said section the plaintiff company and all water companies were required to furnish water free for fire purposes, and that said section was impliedly a term and condition of the grant and privilege given to the plaintiff company and its predecessors in interest and constituted a contract between the plaintiff company and the defendant city obligating the plaintiff company to furnish free water for fire purposes; that the obligation of said contract is violated by the

amendatory act of March 9, 1905, insofar as said amendatory act requires the defendant Boise City to pay any rates for fire purposes, and said amendatory act is thus far and to that effect repugnant to the constitution of the United States, Article I, Section 10, which declares no state shall pass any law impairing the obligation of contracts.

"2. That the evidence on behalf of the plaintiff shows that the alleged cause of action therein set forth is based upon a general law of the State of Idaho, which said general law is not applicable to Boise City, which is organized under a special charter of which this Court takes judicial notice.

"3. That the evidence on behalf of the plaintiff alleges no ordinance or contract under which the plaintiff company ever has been, or is now, authorized to furnish water to the defendant city as required by the Idaho Revised Codes, Section 2838.

"4. That the evidence introduced on behalf of the plaintiff is insufficient to show an implied contract on the part of the city to pay for water furnished by the plaintiff to the defendant city in that the evidence fails to show any knowledge upon the part of the council of Boise City that water was being used for said purposes during the time covered by the complaint herein; the evidence further fails to show any authority to the fire department of Boise City granted by the Mayor or Common Council, to use said water for fire purposes, or for any purposes. And, third, the evidence fails to show that the person using such water for fire purposes had any authority whatsoever under the charter or under the facts to bind the City to pay for water so used." Motion denied. Exception.

III.

The Court erred in denying the defendant's motion for non-suit, renewed at the close of the evidence, on each and every ground therein stated, all of which is shown by defendant's exception No. 10, taken to the rulings upon the trial. (Assignment No. XII. Record p. 78).

IV.

The Court erred in denying the defendant's motion for directed verdict in favor of the defendant and against the plaintiff at the close of all the evidence, all of which is shown in defendant's Exception No. 11, taken to the rulings upon the trial. Exception No. 11 is as follows:

> "The defendant moves that this Court instruct the jury to return a verdict for the defendant in this action on the issues raised by the complaint and answer, on the ground that the admitted evidence shows that if there was any contract between the plaintiff Company and the defendant City at all, such contract was an implied contract, dependent on impliedly authorized supply of water to the defendant City by the plaintiff Company for fire purposes and that said contract, if any there be, did not bind the defendant city to take, accept, or pay for water for any definite period of time, and that immediately at the commencement of the period covered by the complaint in this case, to wit; on the 10th day of May, 1906, the undisputed evidence shows that this contract, if there was any such contract, was formally terminated by the Mayor and Council of Boise City, and that from the 10th day of May, 1906, the plaintiff has been under no obligation to supply, nor has the defendant been under any obligation to accept or pay for, any water for fire purposes.
>
> "The defendant, as further grounds of this motion, reiterates all the grounds of motion for nonsuit made at the close of the plaintiff's case, and repeated by reference at the close of the evidence in this case." Motion denied. Exception.

V.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 12, taken to the rulings upon the trial, as follows:

> "If you find that the City, through the fire depart-

ment, and with the knowledge of the responsible and governing officers of the City, that is, the City Council and the Mayor, continued to maintain these hydrants for fire purposes, and from time to time as there was need continued to use the water therefrom and required the Company to connect its mains with other hydrants—there is some testimony to the effect that eleven additional hydrants were installed at the instance of the City, and connected with the Company's mains—in other words, if you find from all of the evidence in the case that the City, through its responsible officers, the City Council and the Mayor, continued to maintain these hydrants and use them as there was need, and take water from the Company's mains, the Water Company's mains, as there was need therefor, if this was done knowingly, I say, then there arises by implication of law what we call an implied contract on the part of the City to pay for the water, and in this case an implied obligation to pay in accordance with the schedule rates. In other words, the Water Company here stood in the position of a merchant or other person having goods to sell, with the prices thereof quoted. If you go and order an article with price so quoted you do so with the implied agreement and the obligation upon your part to pay for the article the price at which it is offered for sale. So here the Water Company stood in the position of having water for sale, for culinary purposes, for use in business buildings, for sprinkling lawns, and for fire purposes, and if a private person took this water and used it he would do so with the implied understanding that he would pay for it at the rate quoted, and, if the City took it, it took it with the implied understanding and imposed obligation to pay for it in accordance with the rates quoted."

To which instruction the defendant by its counsel then and there excepted before the jury retired, and assigned the giving of the same as error and said exception was allowed and the same is now assigned as error, constitut-

ing and being, defendant's exception No. 12. (Assignment No. XIV. Record p. 79).

VI.

The Court erred in instructing the jury over the defendant's objection as shown in defendant's exception No. 13 taken to the rulings upon the trial, as follows:

> "There was introduced in evidence by the defendant a resolution of the City Council instructing its clerk to notify the Water Company to discontinue (I read now) 'the extra pressure maintained for fire purposes, as the City would pay no further bills for this service from this date.' That is the substance of the resolution, at least. I advise you that that resolution in itself, even though brought to the attention of the Water Company, does not or would not relieve the City from the obligation to pay for water provided it thereafter continued to take the water for fire purposes."

To which instruction the defendant by its counsel, then and there excepted before the jury retired, and assigned the giving of the same as error, and said exception was allowed, and the same is now assigned as error, constituting and being defendant's exception No. 13. (Assignment No. XV. Record p. 79).

VII.

The Court erred in refusing to give the defendant's third request to charge as shown by the defendant's exception No. 17, to the rulings upon the trial, said request being as follows:

> "You are instructed that under the laws of the State of Idaho and the charter of Boise City, as the same existed at the time of the report of the commission fixing water rates in said City, which is involved

in this suit, the City could only obligate itself to pay water rates by an ordinance or contract authorizing the same, and unless you find from the evidence that the City authorized the plaintiff Company by ordinance, to furnish water for fire purposes, or made a contract for such water, pursuant to an ordinance, motion or resolution of the City Council, the plaintiff cannot recover in this action." (Assignment No. XIX, Record p. 81).

VIII.

The Court erred in refusing to give the defendant's fourth request to charge as shown by the defendant's exception No. 18 to the rulings upon the trial, said request being as follows:

"You are instructed that the report of the water commission mentioned in the plaintiff's complaint and embraced in the stipulation of facts filed herein, does not of itself constitute a contract between the City and the Water Company, obligating the City to pay the Water Company the rates for water specified in such report, or any rates, and unless you find from the evidence in addition to such report fixing rates, that there was a contract between the City and the Company obligating the City to accept water and pay such rates, or an ordinance permitting the Water Company to furnish water at such rates as had been or might be prescribed by law, the plaintiff is not entitled to recover in this action." (Asisgnment No. XX, Record p. 81).

IX.

The Court erred in refusing to give the defendant's fifth request to charge as shown by the defendant's exception No. 19 to the rulings upon the trial, said request being as follows:

"The burden rests upon the plaintiff in this case to prove by preponderance of the evidence:

"I. That there was a contract or ordinance under which the plaintiff was authorized to furnish to defendant city water for fire purposes.

"2. That acting under and pursuant to such ordinance or contract the plaintiff company did furnish water to the defendant city for such purposes, during the time specified in the complaint.

"3. That in furnishing such water the plaintiff complied with all the terms and conditions of the report of the water commission, and if any of such terms and conditions were not complied with the plaintiff cannot recover in this action." (Assignment No. XXI. Record p. 81).

X.

The Court erred in refusing to give the defendant's sixth request to charge as shown by the defendant's exception No. 20 to the rulings upon the trial, said request being as follows:

"You are instructed that under the pleadings and proof in this case that there was no contract between the plaintiff company and the defendant city which obligated said city to accept or pay for water for any stated time from the plaintiff company, and the city had the right to terminate the supply at any time. And if you believe from the evidence that the defendant did, by its council instruct the water company to discontinue supplying water under the terms of the report of the water commission, pleaded and in evidence in this case, such instruction terminated the obligation of the defendant city to accept a further supply of water or to pay for any water offered to be supplied or supplied without further authority from the city through its council subsequent to the date of such notification of discontinuance." (Assignment No. XXII, Record p. 82).

XI.

The Court erred in refusing to give the defendant's

seventh request to charge as shown by the defendant's exception No. 21 to the rulings upon the trial, said request being as follows:

> "You are instructed that under the charter of Boise City the power to contract for water supply for fire and other municipal purposes was vested solely in the Mayor and City Council, and that neither the fire chief, nor any member or members of the fire department had any power or authority to bind the City to pay for water for fire purposes by connecting the fire apparatus with hydrants attached to the plaintiff's mains, unless such acts on their part were done in pursuance to authorization of the Mayor and Council." (Assignment No. XXIII, Record p. 82).

ARGUMENT.

ASSUMING THAT THE EASTMAN AND ARTESIAN WATER AND LAN DIMPROVEMENT COMPANY ORDINANCES GAVE THE DEFENDANT IN ERROR A FRANCHISE CONSTITUTING A CONTRACT, WHICH THE CITY COULD NOT IMPAIR BY EXACTING A LICENSE FEE AS A CONDITION OF ITS EXERCISE, THE STATUTORY REQUIREMENT EXISTING AT THE TIME OF THE GRANT THEREOF THAT WATER COMPANIES MUST FURNISH WATER FREE FOR FIRE PURPOSES, BECAME A PART OF THE FRANCHISE CONTRACT, AND THE AMENDMENT OF THAT STATUTE BY THE ACT OF 1905 IMPAIRED THE OBLIGATION OF SUCH CONTRACT AND WAS, AS TO IT, INVALID.

This contention is a secondary and subsidiary contention, and is conditioned solely upon this Court's reversal of the judgment of the Circuit Court of Appeals in No.

313, or the judgment of the District Court in No. 573, on the grounds urged by the plaintiff in error in those cases. The contention of the City in this case, as well as in those, is that the ordinances in question did not confer a franchise nor constitute a contract, but merely a revocable license, and such contention is by no means abandoned by the assertion of the inconsistent position here. But if this Court should disagree with us in this matter, and should adopt the view of the defendant in error here and plaintiff in error in the other cases, it must then follow, we think, that the requirement of Revised Statutes, Section 2711, that companies furnish water free for fire purposes, was one of the terms of the contract of which the franchise grant was another.

This statutory requirement was in force at the time that the alleged franchise was granted to the Eastmans and to the Artesian Water & Land Improvement Company.

The defendant in error attempts to read into those grants the provision of Section 2710 that, "No contract or grant must be made for a term exceeding fifty years." By parity of reasoning the provision of the following section, 2711, that such companies "Must furnish water to the extent of their means in case of fire or other great necessity, free of charge", should likewise be read into the contract. In other words, the City may be regarded as saying at the time of granting this alleged franchise: "You may come into the City and occupy its streets with your mains free of charge, if you furnish water to the City free for fire purposes."

This requirement was an important element to be con-

sidered by the City in granting the right to use its streets. It was a strong motive or inducement for the City to grant such permission. If the grant of the permission upon and under that condition constituted a contract from which the City could not withdraw, the condition because of which the contract was made should also not be withdrawn without its consent.

That laws existing at the time and place of making a contract, and where it is to be performed, whenever they affect its validity, construction, discharge and enforcement, enter into and form a part of the contract, and of the obligation which is guaranteed by the constitution against impairment, is a proposition expressly affirmed by the defendant in error on page 45 of its brief and often announced by the courts, as shown in the authorities there cited, such as,

Walker vs. Whitehead, 16 Wall. 314.

And numerous other cases, of which the following may be cited as examples:

City of Danville vs. Danville Water Co. 53 N. E. 118; 180 U. S. 696.

Springvalley Water Works vs. Schottler, 110 U. S. 173.

Rogers Park Water Co. vs. Fergus, 53 N. E. 363, 180 U. S. 702.

Boston Beer Co. vs. Massachusetts, 97 U. S. 989.

C. B. & Q. vs. Iowa, 94 U. S. 155.

Central Trust Co. vs. Citizens Street Ry. Co. 82 Fed. 6.

That this statutory requirement is one of the obliga-

tions of the contract upon which a water company is permitted to lay its mains in the streets, appears from the following language of the Supreme Court of Idaho, in a case between Boise City and the predecessors of the defendant in error.

> "Respondent contends, also, that the portion of Section 2711 which requires the water company accepting the privileges granted by the statute to furnish any city so occupied water for fire purposes free is unconstitutional, as repugnant to Section 2, Article 15 of the Constitution. This section simply announces a general principle, and the first clause amounts only to a definition; that is, that the right to collect rates, etc., for water supplied to any county, city or town, or the inhabitants thereof is a franchise, and cannot be exercised except in the manner prescribed by law. This section does not amend Sections 2710, 2711 or 2712 of the statute, but would authorize the enactment of just such statute, unless it interferes with the right of the Legislature to say that a corporation so formed shall furnish water for fire purposes free. In our view of it, this section is not prohibitory at all. It is, as said above, simply a definition. It does not say the Legislature shall not pass a law compelling a water company, in consideration of the acceptance of certain privileges and rights, or in consideration of any privileges or rights, to furnish a city or town water for fire purposes free. Neither is this law repugnant to the provisions of Section 6, Article 15, of the Constitution, which says: 'The Legislature shall provide by law the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose.' That is, the Legislature shall provide by law the manner in which reasonable maximum rates may be fixed for the use of water furnished for which the corporation is authorized to charge anything, and does not prevent the Legislature from granting certain privileges, in consideration of the acceptance of which the corporation shall furnish water for fire purposes free, as above

stated. As at present advised, we see no reason for declaring this portion of Section 2711 to be unconstitutional."

A similar view was also announced by the Circuit Court of Appeals, in earlier stages of the litigation between these parties, where it was held that a certain ordinance passed by Boise City requiring the Company to furnish water for City purposes free of charge pursuant to and under the authority conferred by this statute, whether accepted by the Water Company or not, "entered into and became part and parcel of the corporate duties of the Artesian Hot & Cold Water Company, and of the other corporations which became its successors in interest when they were formed for the purpose of furnishing water to the inhabitants of the city", and that consequently the company could only maintain its mains in the City upon complying with such obligation.

Boise City Artesian Hot & Cold Water Company vs. Boise City, 123 Fed. 232.

The position of the defendant in error in this matter seems to us inconsistent with his main contention, that it has a franchise in the nature of a contract with the City, because of certain provisions of the general law existing at the time such contract was made. Surely defendant in error cannot select those positions of the statute which are in its interest and at the same time reject those which it regards as burdensome. Defendant in error cites in answer to this position, *Springvalley Water Works vs. San Francisco,* 61 Cal. 18. The language relied upon by him is not from the opinion of the Court, but from a separate concurring opinion of Justice Sharpstein. Furthermore, no

point is made in that case that the City had by ordinance granted a contract of which the obligation to furnish free water was one of the terms.

II.

THERE WAS NO ORDINANCE OR CONTRACT UNDER WHICH THE WATER COMPANY WAS AUTHORIZED TO FURNISH WATER FOR FIRE PURPOSES TO BOISE CITY AND TO RECEIVE PAY THEREFOR, AND CONSEQUENTLY SUCH CITY HAS NEVER OBLIGATED ITSELF TO PAY WATER RATES FOR THIS PURPOSE.

Attention has been called in the statement to Section 2838 of the Revised Codes (Revised Statutes of 1887, Section 2710), which provides that no company must supply a city or town with water "unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation," and also to the charter provision, in force in 1905, authorizing the Mayor and Common Council to provide the City with good and wholesome water, by contract or otherwise, and to prevent and extinguish fires, but further providing that the powers thereby conferred "may be enforced or exercised by ordinances unless otherwise expressly provided." There is not, and is not claimed to be any ordinance or contract between Boise City and the defendant in error authorizing the furnishing of water to the City, except the old Eastman ordinance and the Artesian Land & Improvement Company ordinance, which simply gave the right to lay

pipes and were passed at a time when the requirement of free water for fire purposes was in force. However, the objection here made is not to the absence of an ordinance under which pipes could be laid in the streets, and water supplied to the City as well as to private consumers upon any contracts being made therefor, but to the absence of any contract by which the City was bound to pay any rates for water furnished. The City's charter, which was the measure of its powers and defined the manner of obligating itself for water as well as for other purposes, vested such power in the Mayor and Council and required the exercise of the same by ordinance. There is in the record an entire absence of any evidence of action by the City Council, either by ordinance or otherwise, indicating a contractual assumption of the obligation here sought to be enforced. It joined in the appointment of a commission under the satute, it is true, but such commission was charged with the right and duty of fixing rates for private purposes as well as for public, and, in fixing such rates, it simply prescribed a schedule of prices which the Water Company was authorized to charge to any one who might demand its service. There is nothing to show that the City ever recognized, in any official way, the report of the commission, and the next action taken by the Mayor and Council was that of May 10, 1906, less than a year after the report, on which date the Water Company was notified to discontinue the extra pressure maintained for fire purposes, as the City would no longer pay any bills for such service. This communication was sent to the Water Company and an answer received from it, insisting upon its right to continue the service and collect the bills, and this litigation is the outcome of this correspondence.

This record, we submit, fails to disclose any contract, by ordinance or otherwise, under which the Company can charge the City with any contractual liability. The charter vested the power to make such contracts as this in the Mayor and Council, and required that it be exercised by ordinance. Without seeking to enforce the distinction made in many cases between municipal action by ordinance, resolution, and motion, it is sufficient here to revert to the basic principle that, where the statute defines the mode of municipal action or the manner of execution of municipal ocntracts, such action or such contracts made or executed in any other manner than that prescribed by the statute are not binding on the City.

Uottman vs. San Francisco, 20 Cal. 97.

McCoy vs. Briant, 53 Cal. 247.

Los Angeles Gas Company vs. Toberman, 61 Cal. 199.

City of Wellston vs. Morgan, 62 N. E. 127.

State vs. Jones, 106 N. W. 963.

Broderick vs. St. Paul, 97 N. W. 118.

And see, generally, *McQuillin on "Municipal Corporations",* page 2619, section 1181.

It is probably unnecessary to pursue this particular point further, because we understand that it is not contended by counsel for defendant in error that there was, here, any express contract, or that charter requirements as to such contract were followed, and it was certainly not the view of the lower court, on which the cause was submitted to the jury. Reference to the instructions and refused instructions, as set out in the Specifications of Error, particularly instruction set out in Specification of Error

No. 5 and refusal to give the instructions set out in Specifications Nos. 7 and 11 of this brief, shows that the view taken by the trial judge was that if the City used the water for fire purposes, with the knowledge of its responsible and governing officers, then there arose, by implication of law, an implied contract on the part of the City to pay for water at the schedule rates. The Court also refused to give the charge requested and set out in Specification No. 11, that the power to contract for water supply was vested solely in the Mayor and Council, and that neither the fire chief, nor any member or members of the fire department, had any power or authority to bind the City to pay for water for fire purposes by connecting the fire apparatus with hydrants attached to the Company's mains, unless such action were done in pursuance to authorization of the Mayor and Council. In other words, the trial court's view was that, although there was no express contract, the City became liable by virtue of the implied contract which arises whenever an individual uses property of another under such circumstances that the latter is entitled to assume an intention to pay therefor. We do not believe that this rule can be applied to municipal corporations, which are creatures of statute ,and whose powers are defined and limited to those conferred by statute.

In a case frequently cited it is said that, if the powers of a municipality are subjected by statute or charter "to restrictions as to the form and method of contracting, that are limitations upon the power itself, the corporation cannot be held liable by either express or an implied contract in defiance of such restrictions."

Jersey City Supply Company vs. Jersey City, 71 N. J. L. 631.

"Where there is a statute or ordinance prescribing a method by which an agent or officer of a municipal corporation may bind a municipality by contract, that method must be followed, and there can be no implied contract or implied liability of such municipality."

Roenheld vs. Chicago, 231 Ill. 467; 83 N. E. 291.

"A municipal corporation does not become liable for a debt by substituting the fiction of an implied contract for an express contract void for non-compliance with the terms of a statute not penal."

Moss vs. Sugar Ridge, 67 N. E. 460.

See also *Moon vs. Board,* 97 Ind. 176.

McGilvery vs. Joint School District, 112 Wis. 354.

"If a contract is invalid because no ordinance was previously passed as required by statute or charter, the city is not estopped, by the receipt of benefits, to deny its invalidity."

Wheeler vs. Poplar Bluff, 149 Mo. 36. L

Paul vs. Seattle, 40 Wash. 294; 82 Pac. 601.

See also *W. W. Cook and Son vs. Cameron,* 144 Mo. App. 137.

Citations might be multiplied indefinitely on these propositions, but we think the foregoing will suffice, and, while we know that there are conflicting authorities, and many cases which hold that a city should not receive benefits and refuse to pay for them, yet, if charter restrictions on the contractual powers of municipalities are to be evaded by permitting implied contracts to be made without any formality, and enforced against the City, such restrictions become entirely inoperative and useless.

But in this case it is not necessary to go so far as to hold that under no circumstances can a City be held liable

for the value of a service which it uses, except upon strict compliance with the charter requirements as to mode of contracting. Not only was there not even an attempt, in the form of any official action, to comply with these requirements, but, moreover, the only official action ever taken was an express denial and repudiation of liability. A reading of the supplemental report of the water commission, attached as Exhibit "A", to the complaint, and found on pages 5 and 6 of the transcript, will show that the principal consideration which the City was supposed to get, in paying for water which had previously been furnished free, was an extra pressure for fire purposes. In other words, the Company had its mains in the streets, which were good enough for the ordinary domestic and municipal uses. In case of fire, however, a greater pressure was thought desirable, and the commissioners felt that a price should be made upon the water furnished at such pressure at an additional expense to the Company. And the commissioners expressly stipulated that, if this standard of service and pressure was not maintained, the City should not pay for the water. The City paid all bills rendered for this service, according to the report of the commission, up to May, 1907, and then, as hereinbefore stated, expressly notified the Water Company that it would refuse to pay any more such bills and that it need not continue the pressure for fire purposes. Under these circumstances, how can it be argued that there was an implied contract with the City to pay for that which it, in advance, expressly declined to pay? It may be said that the Water Company, nevertheless, continued to render the service, but there is no law which prohibits it from volunteering a service. It had the right (assuming, as we do, that it was

under no obligation to furnish water free) to discontinue its service, to disconnect its mains from the hydrants, and to require the City to look elsewhere for water for extinguishing fires. The fire department, by connecting its hose to the hydrants, was not the agent of the Council, nor was the power of contracting for water vested in it.

Thus it has been held that a City can not be held liable on a claim for flushing sewers where there was no contract and where the work was done on the order of some municipal employe.

State Trust Company vs. Duluth, 104 Federal, 632.

So, where one furnished gravel for city streets under contract with a city officer who had no power to make the contract, the City was held not liable for the reasonable value of the gravel.

Bartlett vs. Lowell, 201 Mass. 151; 87 N. E. 195.

Summarizing this branch of the case, the record discloses that the City merely co-operated in the appointment of a commission to fix rates for general domestic and municipal purposes. After those rates were fixed, it paid the rates established for fire purposes until, becoming dissatisfied, for some reason which the record does not disclose, with the service renedered, it notified the Water Company to discontinue it, and informed the latter that it would no longer pay the rates prescribed for such service. The Water Company notified the Cty that it would render the service and hold the City liable in any event. The learned District Judge adopted the view that, notwithstanding such notification by the City to the Company, the latter could hold the former liable, because other

employes of the City, who were in no event authorized to contract for it, used the service rendered. In the view we take of the case, the Company was under no obligation to continue the service after receiving the City's notification of refusal to pay therefor, and it had no right to acept the actions of other unauthorized municipal employes in using the service which the Council refused.

We submit that the judgments in Nos. 313 and 573 be affirmed and the judgment in No. 639 reversed.

Respectfully submitted,

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